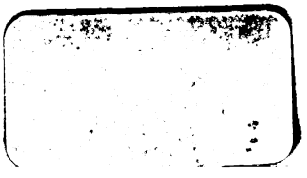

REAL PROPERTY,

MORTGAGE AND WAKF

ACCORDING TO OTTOMAN LAW.

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REAL PROPERTY,

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§ I.—*Of Ottoman Laws in General.*

1. In the study of Ottoman legislation it is indispensable to bear in mind the fundamental distinction that exists between the law, properly and truly so called, —that is, the Moslem *Shara*,—and the ordinances of the rulers, which constitute the *Kânoun*.

2. Moslems believe, in fact, that for them there is but one law, and that this law is immutable and invariable, to wit, the religious law (*El Sharaa*) that is found written in the Korân and in the Mahomedan traditions (*Sunnah*), and that contains the private civil law also.*

3. The rulers cannot make the least alteration in this law; and, therefore, they have, strictly speaking, no legislative power.† They can, at most, interpret it, and even in this they are not free, but are bound to take the opinion of the law doctors,—*i.e.*, the *Muftis*, at the head of whom stands the *Sheikh-ul-Islâm* of Constantinople,—and obtain their "parere," or *fatwa*.‡

4. This is the reason why Moslem law has not hitherto

* Miltitz, *Manuel des Consuls*, tome i. Appendix VIII.

† True, Moslem jurists hold that the sovereign has the fulness of legislative power, but only as to that which is not regulated by the religious law nor contrary to it.—Miltitz, *loc. cit.*

‡ Miltitz, *loc. cit.*

progressed. And if, in very recent times, attempts have been made to improve it, they have encountered the greatest obstacles; indeed, it can be said of the new principles, established by the more recent Imperial ordinances, that they have not at all penetrated into the habits and convictions of the people.

5. Thus, the new Constitution of the Ottoman Empire, contained in the Hatti-Sharîf of 1839, and in the Hatti-Humayoun of 1856, was not published until it had been sanctioned, so to speak, by the *fatwas* of the Moslem *Ulema*, who declared that the principles contained in those two Charters were in conformity with the *Sharaa*, or religious law. In reality, however, they are not in conformity with it, but may rather be considered as an attempt made by the Sultan to modify and correct the Moslem law in its most intolerant and impracticable parts; and therefore it is that these charters are but little respected. By good Moslems they are regarded as nothing else than a violation of the *Sharaa;* and the religious courts, that is to say, the *mahkamahs*, presided over by the *Câdis*, in no way respect or observe them.

6. Equal progress has been also made by Ottoman law in the matter of commercial legislation. Of the latter it can be said, without fear of erring, that there are no traces of it in Moslem law. This was a very great void, and one which the Sultans have thought that it behoved them to fill up. And to do so, they could not but recur to the commercial legislation of Europe, which has been accepted by the world at large. Moreover, Turkey could no longer do without it after that she had entered into the European political concert, and had promised to adopt the best out of that which European civilisation has produced. Indeed, the Sublime Porte adopted the French code of commerce, copying it almost literally. But how was it to be adopted, if the Sultan has no true legislative power? Recourse could not be had to the ulemas, or law-doctors, because certainly the principles of European commercial law could in no way have been found either in the Korân or in the Sunnah. And, so far as we are aware, the Sultan did not recur to that

body of men; he simply published the code of commerce *motu proprio*, and in the exercise of his autocratic power.

7. But who would have applied it? Certainly not the Moslem courts of law. Let any one present himself, if possible, at the *Mahkamah* and quote the Ottoman code of commerce to the judge. The *Câdi* would deem himself insulted, and would reply that that code is not law, and that he does not know it. Let any one go to the *Mahkamah*, and ask the *Câdi* to recognise a commercial company as a juridical entity capable of holding property, and hence request him to register a house or a parcel of land in its name, he will answer that the *Sharaa* does not recognise it as such, and that, the code of commerce published by the Sultan to the contrary notwithstanding, he cannot comply. His refusal will be even more emphatic if he be asked to condemn any one to the payment of legal interest, which is admitted by the Ottoman commercial code, and also by other Imperial ordinances, but which the *Sharaa* most strictly forbids.*

8. Hence, in order to be able to apply the commercial code, the Porte had to institute suitable tribunals, wherein the religious element does not at all enter, and entrust them with its application. Any tribunal other than these could not have done it.†

9. The same had to be done in order to obtain the application of the imperial ordinances that have civil causes for their subject-matter. Councils, or *Madjlises*, have been instituted in every chief provincial city, and to them has been entrusted the administration of justice in accordance with the new Imperial ordinances. Without such courts the latter would have remained wholly a dead letter, which they are even now in part, by reason of the bad organisation of these tribunals.‡

* Ordinance of 1852 relating to the uniform rate of interest, and Appendix to the Code of Com. Title III. of interest.

† As to the Tribunals of Commerce, see the Ottoman Code of Commerce and the *Règlement* for Egypt in Gatteschi's *Manuale di Diritto pubblico e privato Ottomano*, pp. 341 and 546.

‡ As to the organisation of such Tribunals, see vol. i. of the *Bollettino*, p. 8, *et seq.*

10. All this sets forth the immense difference between what the Moslems consider as the only true law, which they call the *Sharaa*, on the one hand, and the law of the sovereign, or *Kânoun*, on the other. And we may say that in Moslem countries there exist two legislators, and two wholly different judiciary orders.

11. First, there is the true legislator, Mahommed, who can be neither corrected nor gainsayed, and who imposes his laws by a moral force which is immense in its influence over the Moslem population.

12. Second, there is the political legislator, the Sultan, who imposes his laws by material force.

13. There is the religious judiciary order, known as the *Mahkamah*, and composed of the doctors of the law, or *Ulemas*, who recognise and apply nothing but the *Sharaa*.

14. There is also a civil judiciary,—the *Madjlises* and the tribunals of commerce,—instituted by the Sultans, which apply the *Kânoun*, or Imperial ordinances.

15. If these remarks upon the legislative and judiciary condition of Moslem countries are not premised, it is impossible to understand the legal provisions that are in force concerning real estate in the Ottoman Empire, and other matters of private civil law.

16. Because real estate is regulated, like all other matters of the law civil, partly by the *Sharaa*, or religious law, and partly by the *Kânoun*, or secular law. And I shall have to recur often, nay, continually, to the one or to the other of these laws, to indicate the principles upon which such or such a matter is based. Indeed, without this, the imperial ordinances which deal with this subject-matter, would themselves be unintelligible; for, being themselves intended to complete and modify the religious law, the *Sharaa*, they continually refer to it; and, without a knowledge of the latter, it would be impossible to fully understand them.*

* The Imperial ordinances expressly and very often refer to the religious law, *Sharaa*. Thus the ordinance of 7 Ramadan, 1274 [April 21, 1858], art. 3, says: "La législation et procédure relatives à ces quatre sortes de terres *mulk*, se trouvant dans les livres de jurisprudence religieuse (Fiqh), ne seront pas traités ici."

§ II.—*Of the Right of Real Property, according to Ottoman Laws.*

17. It is held by many in Europe that in Moslem countries the right of real property does not exist.* This is a very grave mistake, engendered perhaps by the miserable state to which despotism has reduced those countries. The right of real property does exist in them, and the legal sanctions which render this right as sacred and as inviolable as it is in Europe are not wanting. If it is not respected, this is so by reason of the abuse of power, and is the result of the lack of a judiciary, that can afford serious guarantees for a right administration of justice. In those countries, regularly organised tribunals are wanting; in them a good rule of legal procedure is wanting; a legislation within the reach of all is wanting; and despotism renders it quite impossible for the judges to pronounce impartial judgments. Of what good are the laws, if no one is there to apply them? A country may have very good,—nay, it may have the very best of laws, but they are a dead letter unless there be a judiciary power existing under such conditions as to give them life.

18. And this is just what happens in Turkey. There is a deplorable insufficiency of legal procedure, and the ignorance of the Moslem judges is great beyond description. Hence the best laws are in Turkey quite useless. This is all the more so from the fact that Moslem law is known to a very few only, and constitutes the monopoly of a religious caste. Its study is confined within the mosques, and the State in no way cares for or about it.†

* Anquetil Duperron, *Législation Orientale*, III. *Partie*, sec. 1, page 116.

† The legislation upon the right of property is for the most part contained in the books of religious jurisprudence, which are written in a style so difficult as to be understood by a few only. Indeed, it may be said that, aside from the *Ulemas*, no one is in a position to comprehend them. Hence it is that the masses in Moslem nations are ignorant of the laws by which this right is governed and regulated, and

19. The *Câdis*, who alone are the true judges according to Moslem law, are taken from among the *Ulemas*,—a body distinguished for religious zeal and narrow-mindedness. Moreover, they are so exposed to removal from office, that they may be at any moment discharged by the Government.

20. As for the civil councils, or *Madjlises*, those who go to make them up are wholly destitute of every juridical notion.* Nay, they are oftentimes so ignorant that it is a wonder if they know how to read and write.

21. With such elements, what can be expected of Ottoman tribunals? Assuredly not the guardianship of the rights of the citizen. Hence it is that the rights of property are not thoroughly guaranteed, and that inroads and encroachments upon them are continual, the same as upon all the other rights of citizens.

22. This is why it has been believed in Europe that every idea of the right of property is lacking throughout Turkey. The truth is, that the right of property, both of chattels movable and chattels immovable, in the strictest meaning of these words, is fully recognised by the religious law, or *Sharaa*, as well as by the *Kânoun*, or Imperial laws, and so fully that not even was expropriation for reasons of public good allowed, until the most recent times.†

that the interpretation of these laws belongs to the religious caste alone.

* Very curious examples may be cited of judges, appointed in the Egyptian tribunals, who know nothing of legislation. Thus, in the mixed tribunal of commerce of Alexandria an arsenal guard was appointed as president, then an inspector of railways, and lastly an admiral. Any one can imagine with what confidence the most knotty questions of commercial law, including maritime cases, could be submitted to such presidents, upon whom chiefly depends the decision of a suit.

† Anquetil Duperron, *opus citat.* p. 123, notices the case of a house, belonging to a lady, that could not be expropriated at Constantinople, although it involved a work of public utility, namely the opening of a public square, in order that the archives of the State should not be exposed to fires, so frequent in that capital. Now, however, the Imperial ordinances have admitted such expropriation, as will be seen during the course of this work.

23. As for the basis or foundation of the right of property, Moslem jurists find it in the following verse of the Korân, verse 27, chap. i. (Kasimirscki's translation):—"C'est Dieu qui a créé pour nous tout ce qui est sur la terre." From this they draw the conclusion that all that is not possessed by others can be taken and occupied by the first-comer.

And still clearer in the *Hadîth*, or sayings of the Prophet, that whoever has "re-enlivened" a dead land becomes the owner thereof. By dead land they mean a parcel of land abandoned and not cultivated, which, as will be seen hereafter, may be taken by the first occupant, who by his occupancy becomes its proprietor.*

24. Wishing to notice the technology of Moslem jurists, I will observe that the right of property in real estate is designated by the word *mulk*, which indicates everything unencumbered, free, and alienable. It is derived from the same root as the words *mâlik*, king, and *mâlik*, possessor.

25. This right is, moreover, defined by the Imperial law of 1858 as follows:—"La terre *mulk* est à l'entière disposition du propriétaire, elle se transmet par voie d'héritage, comme la propriété mobilière, et peut être soumise à toutes les dispositions de la loi, telles que la mise en *vaqouf*, le gage ou hypothèque, la donation, préemption ou retrait vicinal." It, in short, corresponds with the *dominium* of the Romans, which comprised the *jus utendi, fruendi et abutendi*, otherwise called the *plenaria rei potestas*.

26. Real property is, with the Moslems, of two kinds: private and public.

27. Private real property is that which belongs to the citizen, and is expressed in a special manner by the words real-estate—*mulk*. Public real property is that which belongs to the State, and is expressed by the words real-estate—*emîriah*.

* On landed estate in Moslem countries, the interesting work of Dareste is worth consulting, *La Propriété en Algérie*, p. 76.

"Occupancy gave the original right to the property in the substance of the earth itself."—*Blackstone*.

28. But, beside the State, there are, in Moslem countries, other juridical entities that have the right of holding and owning real property. There is the universality or commonwealth of the Moslems, and there are benevolent and religious institutions that can be proprietors, such as mosques, hospitals, schools, and other institutions.

29. Finally, there are also, according to Moslem law, lands that have no proprietor whatever; and these are the uncultivated and abandoned lands, and which are, therefore, called *dead lands*.

30. Thus, then, real estate may be quite well divided, according to Moslem law, as it was according to the Roman, that is to say, into—

(i) Property that is within our patrimony, and is alienable or conveyable, *in patrimonio;* that is to say, property within the ownership of private persons, *res privatæ*, and *res singulorum;* and this would be real-estate—*mulk*.

(ii) Property beyond our patrimony, *extra patrimonium nostrum habentur* (Cajo ii. 1, Jst. pr. de Rer. div.); that is to say, property common to all, *res communis omnium*, and to which correspond, in Moslem countries, the lands *matroukah;* that is to say, left for public use, such as the highways and pasturages left for the use of a canton or commune.

(iii) Property that belongs to the State, *res publicæ*, and which corresponds to the lands *emîriah*.

(iv) Property belonging to a corporation, *res universitatis*, and which corresponds to the lands *maukoufah*, or *wakouf*, to wit, belonging to the mosques, to institutions of religion and benevolence, to the poor, and also to Christian churches; in short, property in mortmain,—that is, not alienable.

(v) Lastly, the *res nullius*, or no-man's lands, of which no one has possessed himself, or which have been abandoned by the proprietor, with the intention of giving up his right of ownership therein, and which correspond to the dead lands, *mouwât*, of Moslem law; that is to say,

those not cultivated and without owner, and which may be taken by the first occupant.

31. Furthermore, as to the modes of acquiring the right of property in real estate, according to the *Sharaa*, they do not differ much from those admitted by the Roman law.

32. They may, like the latter, be divided into modes of acquisition *inter vivos*, and *causa mortis*.

33. Among the former may be put, first of all, occupancy; then conveyance by any title whatsoever; accession;* the gathering of the fruits or increase; and acquirement by prescription or lapse of time.†

34. And among the latter modes may be placed last wills and testaments, and intestate inheritance.‡

§ III.—*Of the Ushuriah Lands (subjected to the tithe), and of the Kharâdjiah Lands (subjected to the tribute).*

35. But even after making this classification of real property in Moslem countries, one must not believe that it is easy to ascertain whether a given parcel of land is to be put in the one or in the other category.

* *Accession.*—One of the modes of acquiring property; all that which grows out of the property, and again joins itself with it, without having been given by others, and which is brought about either by nature or by art.

† In Moslem jurisprudence these modes of acquiring the right of property are not so clearly and precisely indicated as is the case in the legislations of Europe. In fact there is wanting a book or chapter, entitled, "Of the Right of Property," and dealing directly therewith. But it is none the less true that in the various jurisprudential treatises of the Moslems these different modes of acquisition are to be found indicated in substance, as may be seen in the *Hidâyah*, or Guide;—in *Multaqua el Abhur*, as in D'Ohsson;—in Macnaghten's *Principles of Mohammedan Law*;—in *Khalil Ibn Ishac*, translated by Perron, *Précis de Jurisprudence Musulmane.*

‡ Al Siraiah, or the Mohamedan Law of Inheritance;—Solvet, *Notice sur les successions Musulmanes*;—Elberling, *Mohammedan Law of Inheritance*;—Tornau, *Le Droit Musulman exposé d'après les Sources.*

To arrive at this, it is indispensable that new researches be made, and that other legal criteria be had. And this is the most difficult part of the present study.

36. For in Moslem countries an immense quantity of land is peaceably held and tilled by the peasants, and of which they are, nevertheless, not the absolute proprietors. And in the Orient such acts on the part of the Government have been witnessed, as have been believed to be simple acts of spoliation and confiscation, whereas in reality they are not; and I believe it is from just such acts that the erroneous opinion has arisen of the non-existence of the right of real property in Moslem countries.

37. The truth is that in these countries the landed estates belonging to the Government were, and still are, most numerous, whereas the number of private estates or possessions were, as they are even now, quite limited.

38. In order to be able to ascertain to what class of property land in the Levant belongs, those Orientalists who have busied themselves with this hard task have recurred to the system of taxes imposed by the Moslem law, inasmuch as it has been believed that from the quality of the tax established upon the land, one can find out with certainty who is its true owner. And the argument is made as follows:

39. According to the *Sharaa*, true taxes cannot be put upon the property of Moslems;* but upon it is to be paid the tithe or tenth of its produce (*'ushr*), which, under the title of *Zakât* (religious alms), ought to be given by the owner for the good of the commonwealth of the believers, as represented by the Government, which tithe is to go towards supplying the public treasury (*Beit-ul-Mal*). This idea of the tenth part, which reaches back to Mahommed, has been taken, it seems to me, from the Mosaic books, like the greater

* At the present time no distinction is made in Turkey between Moslems and dissenters in this respect, all being subjected to the same taxes, by virtue of the recent Imperial ordinances. See Bélin, *Op. citat.* note 109, *et seq.*

part of the moral ideas and principles that we find in the Korân.

40. *Multaqua el Abhur*, as translated by D'Ohsson, says:—"Sur tout ce que produit la terre il est dû le dixième, qu'on nomme *uchour*."

41. But, as to lands not originally belonging to the Moslems, but conquered by force of arms and by capitulation, these are burdened with a tax, other and heavier than the tithe or dime, and which is called *Kharâdj*. This tax no longer represents a contribution that is paid under the head of alms and out of religious duty, but is a true and real tribute weighing upon the conquered territory.

42. Hence Moslem law doctors distinguish lands into tithe-paying (*ushûriah*) and tribute-paying (*Kharâdjiah*), according as the one or the other of the two taxes is laid upon them.

43. It has been held, furthermore, that the nature of such imposts affects or influences the right of ownership to the lands. Whilst it seems that, according to the *Sharaa*, the *Kharâdjiah*, or tributary lands, are not really owned by the holders, but belong rather to the State, which leaves the enjoyment and usufruct thereof to the holders against the payment of the tribute,* the tithe-paying lands, on the contrary, would seem to belong to the holders in full, free, and absolute right of ownership.

44. And this is in fact the conclusion arrived at in the interesting work of Worms, upon the right of real property in Moslem countries,† which has for its aim just this, to prove that in all countries conquered by the Moslems there is no private real property, but that all the land belongs to the Government. From which that writer sought to draw the conclusion that in Algiers the French Government could very well appropriate to

* It may be said that they are *in bonis* of the holder, which is a very different thing from the *dominium plenum* or *quiritarium* of the Romans.

† Worms, *Recherches sur la Constitution de la Propriété territoriale dans les Pays Musulmans.—Journal Asiatique*, 1842, 1843, and 1844.

itself as much land as it wished, and despoil the possessors of it. Thus he justifies and approves what Mohammed Ali did in Egypt when he took the lands from the Fellahs, whom he reduced to the condition of simple tillers on behalf of the State.

45. Nevertheless, this opinion seems to be too much animated by a feeling of French national interest to be worthy of full belief. Indeed, from the very texts of the Moslem jurists cited by Worms, it seems to me to be greatly weakened and open to many restrictions.

46. It is not easy to confute this learned writer, so great is his erudition and knowledge of the Arabic tongue and writers. Nevertheless, I will venture to make a few observations upon the conclusions at which he arrives.

47. First of all, it is undoubted, and Worms himself admits it, that the dwelling-houses, the gardens, and small parcels or orchards,* although situated in a country subjected to the tribute-tax (*Kharâdj*), are within the full and absolute right of property of their holders.

This is a most important restriction to the rule laid down by him that every country conquered by force is placed under the Kharâdj-tax, becomes *Wakf*, and, therefore, cannot be within the full ownership of the holder.

48. But beside this, the *Multaqua el Abhur*, cited by him (page 68) says :—"Il peut encore laisser à leurs anciens propriétaires non musulmans les fonds ruraux situés dans les contrées qui se sont soumises volontairement ou rendues par capitulation, ou qui ont même été reduites par la force des armes, en imposant sur ces biens un tribut, soit fixe soit proportionné à leurs productions annuelles ; telles sont les terres *tributaires* (*Kharadgié*)." Nor is this contradicted by what it says elsewhere, that if any one does not cultivate the land given over to him, thus making it impossible for him to pay the tribute thereon, the Sovereign can take it from him and give it to another.

* "*Terres de petite culture.*"

Thus, then, this may be considered somewhat like a fine, or at least as a forced expropriation, or sale by reason of the unpaid taxes, and not at all as a negation of the right of property.

49. But in the *Hidâyah* also (*cited by him on page* 80) it is still more clearly set forth that, from the fact of lands being tributary (*Kharâdjiah*), it does not follow, by necessary consequence, that the right of property thereto is not vested in the holder.

"De cette contrée les terres qui constituent l'Arabie propre sont décimales ou achoury, et celles de l'Irâk arabique sont tributaires ou Karadgié. Il est à observer néanmoins que les terres de l'Irâk sont la propriété des habitants, qui peuvent légalement les vendre ou en disposer à leur gré, parce que toutes les fois qu'il soumet un pays par la force des armes il est libre de rétablir les habitants dans leurs possessions, et d'imposer sur leur territoire et sur eux, le tribut et la capitation; et ceci ayant eu lieu, le pays continue à être la propriété des habitants, comme cela a été dit plus haut en traitant du butin."

50. Greater clearness than that of this passage could not be desired for impugning the opinion that, from the bare circumstance of lands being *Kharâdjiah*, it necessarily follows that the right of property thereto is not vested in the possessor, but rather in the State.

51. And even better still, if such be possible, does *Mauardi* express himself to the same effect (lib. xii. page 105):—

"La capitulation de la deuxième espèce a pour résultat de leur maintenir la propriété de leur terre pour laquelle ils doivent alors le *Kharadj*, mais ce *Kharadj* subit les règles et prend le caractère de la capitation, ils cessent de le payer du moment où ils embrassent l'islamisme, et leur terre ne fait pas partie du domaine musulman; elle est considérée comme pays d'alliance, ils peuvent en disposer par vente ou hypothèque. Quand elle passe à un musulman il n'est point tenu d'en acquitter le *kharadj*."

And elsewhere:—"Le second des cas susmentionnés

est celui où ils ont stipulé le maintien de leurs possessions, et la réserve de leur droit de propriété sur les fonds, moyennant un *Kharadj* qui y est attaché. Ce kharadj alors n'est autre chose qu'un djizia (capitation). Ils doivent continuer à le payer tant qu'ils restent dans l'infidélité, mais la conversion à l'islamisme les en affranchit. Aussi on ne doit pas leur demander l'acquittement de la capitation proprement dite, et ils ont le droit de disposer de leur terre par vente, soit entre eux soit au profit des musulmans."

52. Moreover, it is in every case admitted by the *Sharaa* that the Imâm (ruler) can grant *Kharâdjiah* lands in full right of property, sell them, declare them to be *mulk*, and also declare them to be tithe-paying (*ushuriah*) for and unto the acquirer or grantee. Thus the *Djarîdai-Hawadis*, cited by Bélin (page 42), says :— " Le Sultan, comme administrateur du domaine public peut vendre et donner à titre *mulk* telle partie de terrain *miri*, sur laquelle personne n'a de droit légal, et ce pour un prix modique, après avis du *mufti*."

53. Finally, another proof of this is to be had in the circumstance that, in conquered and tributary countries as well, there is also much *ushuriah* land and *wakf* property. All which could not be if the *Kharâdjiah* lands were not held by right of property by the holders; for, in order to be able to establish a *wakf*, it is indispensable that one have the full and absolute right of property in the land itself.

54. Therefore I believe that the preference over the opinion of Worms is to be given to that of Bélin, according to which not all lands or countries subject to the tribute or *Kharadj*-tax are [of necessity] the property of the State. Bélin says that in this respect it is necessary to proceed with discrimination, to ascertain what happened at the moment of the capitulation; for, if the lands were then left to the holders with the compact that they should pay the tribute whilst remaining *mulk*-proprietors, then, in such a case, the circumstance of the lands being *kharâdjiah* does not make them belong to the State. On the contrary, if at the time of the

conquest or capitulation they were declared to be "immobilised" (inalienable), *i.e.*, national *wakf*, then the right of property therein belongs not to the private holders, but rather to the State.

55. This opinion is likewise embraced by Baillie, a learned English writer, who has published very important works upon Moslem legislation.

In his treatise on sales according to the Hanafite Rite* he observes that in India also it was believed that the Moslem princes boasted the right of property over all the *kharadjiah* lands. And to contradict such an assertion he cites the following passage from a work on Moslem jurisprudence which he says is of great authority :†—" The Sawâd land of Irâk is the property of its inhabitants. They can alienate it by sale and dispose of it as they choose. For when the Imâm (ruler) conquers a country by force of arms, if he permits the inhabitants thereof to remain there, imposing upon them the *kharadj* on the lands, and the *djizyah* upon the persons, the land is the property of the inhabitants; and, whereas it is their property, they can lawfully sell it and dispose of it at their will.—(Seiaj-ool-Vahai)."

56. The conclusion that may be drawn from what has been above given as to imposts, as a means of determining the nature of the lands, is as follows:—that besides dwelling-houses and gardens, which always belong to the holder, who pays no tax thereon, all lands on which the tithe (*ushr*) is paid are undoubtedly held by absolute right of property (*mulk*) by the individual or private possessor. And, further, the lands subject to the tribute (*kharadj*) may also be held by the private individual in absolute right of property, in which case they do not differ from the tithe-paying (*ushuriah*) lands, except as to the amount of the tax, the *kharadj* being heavier and more changeable than the *tithe*, which latter is fixed and invariable. When, however, it cannot be proved that the *kharâdjiah* lands belong to private

* Neill B. E. Baillie, *The Mohammedan Law of Sale, according to the Hunefeea Code.* London, 1850.

† *Opus cit.* book i. chap. ix. sec. iii. p. 153, note.

individuals, they belong to the State, and are called *emîriah*. And then the holder has them by way of rent or usufruct; he can neither sell nor mortgage them; the State can retake them; and, at the death of the holder, they revert to it, and it can dispose of them as it thinks best.

57. In confirmation of all this it is not amiss to refer to what is said by the *mufti* Ali Nighadi, in *Kitab-el-Zawâid-el'aliyyah*, cited by Bélin*:—

"La terre occupée ou conquise par l'imam sur un peuple infidèle doit être partagée entre les *ghanimin*† ayant droit au butin. L'imam donne à chacun d'eux la portion de terre lui échéant, elle devient alors sa propriété *mulk*, et peut recevoir toutes les formes de mutation, telles que la vente, le prêt, etc. Cette catégorie est dite uchriée.

"Si l'imam fait grâce aux vaincus, il frappe le *djizié* sur leur personne, et le *kharadj* sur leurs terres; puis mettant le comble à ses bienfaits il leur confirme la propriété *mulk* de ces terres; lesquelles de même que les précédants peuvent devenir l'objet de mutation. Cette seconde catégorie est dite *kharadgié*."

"Mais si l'imam veut que ces terres ne soient la propriété *mulk* de personne, on les considère alors comme *vacouf* affecté aux besoins des militaires et de la communauté musulmane; après toutefois la fixation du *kharadj*. Sur le montant de ce tribut le *beit-ul-mal* paye à tout militaire la part lui échéant.

"Si l'imam confère à l'un d'eux l'administration d'une partie de ces terres sous la forme *idjârah muaddjélé* dite *tapou* il perçoit le *karadj* imposé sur la terre. Cette troisième catégorie est dite *mirié*. L'étendue et la contenance de ces terres est dans les archives impériales.

"Le Sultan seul peut en donner la propriété *mulk;* tout acte de mutation y relatif, tel que vente, achat, hypothèque, ne peut être valable sans le concours du délégué de l'autorité souveraine."

58. We can therefore say, with all certainty, that the

* Bélin, *opus cit.* p. 125, note 296. † Victors, Booty-takers.

lands held by right of private *mulk*-property, according to the *Sharaa*, are composed of:—

(i) All lands and houses that are situated within the towns, communes, or cantons, and also of all the lands that are situate in their vicinity at a distance of half a *dunum*,* and which are considered as the complement of the dwelling or habitation.

(ii) All the tithe-lands (*ushuriah*).

(iii) The *kharâdjiah* lands that were kept or left within the right of ownership of the holders at the time of the conquest, or those which were afterwards granted by the State, by way of free *mulk*, to private parties, whether by sale or by gift.

59. Furthermore, as to the public property of the State, or *emîriah* lands, this class is composed of all the lands possessed directly by the ruler or prince, and of those *kharâdjiah* lands which the Government left in the occupancy of the holders, without giving to the latter the right of property therein, and which it afterwards granted, by precarious and temporary title, against a yearly rent; finally, of the national *wakfs*, constituted for the good of the Moslem commonwealth.

60. The amount or extent of these lands of the State (*emîriah* lands) has always been great in Moslem countries; because, aside from the lands reserved for himself by the sovereign from the first and at the time of the conquest, and granted precariously, there are also the free *mulk* lands, which, in the case of the death of the owner without heirs, have reverted to the *fiscus*. And it can well be supposed that, owing to the immense and continual revolutions occurring in Moslem states, these cases have not been rare.

61. I shall end with the remark that, although the recent Imperial ordinances have abolished, in matters of imposts, every difference between the *tithe* and the *tribute*, yet the classification of lands into *ushuriah* and *kharâdjiah* is now in vigour, and is such as to determine

* The *dunum* is an extent of ground that a yoke of oxen can plough in one day, and is about nine hundred square mètres.—Bélin, *op. cit.* p. 140.

the origin and the nature of the rights which the holders have. It is, therefore, indispensable to bear this classification in mind, if we wish to understand the Ottoman laws that relate to the right of real property in Moslem countries.

§ IV.—*Of the Ottoman Laws concerning the* emîriah *Lands, or Lands of the State.*

62. It is with these *emîriah* lands, or lands of the State, that we should occupy ourselves in a special manner, because they have been the subject of the latest and more recent legislative provisions in Turkey, and because, as we have already observed, they form the greater part of the Ottoman territory.

63. As for the private lands, it is the religious law, or *Sharaa*, which continues to be observed and applied to them. Likewise, it is the religious law which regulates the rights pertaining to the real estate of religious institutions, or *wakf*.

64. It is on the other hand, the Imperial ordinances, or *Kânoun*, that regulate the rights pertaining to the *emîriah*, or State lands; and in these latter times it has been proposed to ameliorate, through these ordinances, the condition of the owners or holders thereof, and to render them almost absolute proprietors, so as to encourage agriculture and render productive immense tracts of land that have remained abandoned and untilled.

65. The provisions of the *Sharaa* as to the lands belonging to the State (*emîriah* lands) were very nearly as follow:—Starting from the principle that *every "dead land" belongs at the outset to God, and hence to His Prophet*, the sovereign can give the lands of the State to whomsoever he will, by way of grant, or *iqtaa*, which means *a portion cut away, from the lands belonging to the State, in favour of private individuals.*

66. Such a grant is governed by the idea of bringing

the untilled lands into cultivation.* Thus we find in the books of Moslem jurisprudence, when they speak of *iqtaa*, that the grantee of the lands is bound to cultivate them, or else lose his right of enjoyment therein. And in this regard, a tradition of Mahommed is reported which is couched in the following terms:—"Every individual who, during three years, shall leave uncultivated a piece of land, of which he has possession, shall lose his rights over the same; and if a third party comes along, who will cultivate it, this latter shall have a greater right to possess it than the former owner."†

It is well to bear in mind this maxim of Moslem jurisprudence relative to lands granted by the State, because it is still in force, and we see it figuring even in the latest Imperial ordinances.

67. The State lands may be granted, according to the *Sharaa*, in three ways,‡ to wit, in fee simple, or *mulk;* by way of usufruct; and by way of participation. Nothing need be said as to grants by way of *mulk*, because the grantee becoming, by force of such a grant, the full proprietor of the land, the concession is held to be perpetual and irrevocable; and for its duration there is no other condition than that of cultivating the land.§

68. As for the grant by way of usufruct and participation (which latter is confined to mines and salt-works), this lasts only for a determinate time, and does not pass to the heirs. At most it can be only during the life of the grantee. The heirs have no right whatever in it, and all that can be granted them, in compensation for the lands, retaken by the State, is something by way of gift, and as an encouragement to the army; because such grants were, at the beginning, made only on account of military services; and because, also, according

* Bélin, *op. cit.* p. 116.
† Makrizi, cited by Bélin, *op. cit.* p. 116, note 346.
‡ Ibn Djim'aa, cited by Worms, *Journal Asiatique*, April 1842, p. 371.
§ Bélin, *op. cit.* note 275, p. 119, *et seqq.*

to *Mawardi*, such grants would be revocable by the sovereign even after only one year's enjoyment.*

69. This was the applied rule during the Arab domination. Later, however, the Imperial ordinances, or *Kânoun*, established various modes of granting of lands that are not to be found written in the books of Moslem jurisprudence. And these were the *feudal* grants, by virtue of which the Sultans gave a large portion of the conquered land to their companions in arms, by way of *Ziamet* and of *Timar*,—great and small feuds.†

70. "The feudatory," says Hammer,‡ "enjoyed during his natural life, and by an hereditary title in the male line, the rents, or increase, of the land granted him, with the obligation, not only to himself march in time of war, but also to furnish a certain number of soldiers, proportioned to the importance of the rents of the feud.

71. And almost all the Turkish Empire was made up of these feudal lands, in which the grantee had not the real right of property, but only the right of enjoyment, with the option of granting to the tillers, for such compensation as might be agreed upon, such portions of them as suited his pleasure.

72. Here are some of the provisions of the Imperial ordinances relative to the *Ziamet* and *Timar*:—The grantee of the feudal lands was called *Sipahi*. He was bound to reside within his feud, so as to exercise therein his feudal rights, and specially in order to furnish military service.

73. On the other hand, he had the right of gathering, from the inhabitants of the feud, all the religious and civil imposts to which the lands held by them were subject.

74. Further, he exercised a kind of jurisdiction over the *rayah* tenants, whether Moslems or Christians, to whom he granted the lands.

75. The *rayahs*, who cultivated these lands granted to

* Bélin, *op. cit.* note 292, p. 124.

† Bélin, *op. cit.* note 295, *et seqq.* p. 125. D'Ohsson, vol. viii. p. 275.

‡ Cited by Worms, *op. cit.* p. 234.

them by the *Sipahi*, were also in a condition of servitude towards him. They could not go away from the village at their pleasure; they were bound to furnish certain labour to the feudatory; they forfeited the lands if they did not cultivate them; and they could neither sell nor mortgage them, nor put them in *wakf*.

In a word, they were simple usufructuaries, without even the right of transmitting the lands by last will and testament, or *ab intestato*.

76. What, then, was the consequence that flowed out of such legislative provisions?

The consequence was that the holders of the lands of large estates (*grande culture*), the *kharâdjiah*, were exposed to all the whims of the feudatories. The peasants could in no way count upon the fixity of their tenure; they therefore took no interest in the lands; they made thereon no lasting works or improvements; they were content with the yearly crops, and were always ready to abandon the lands whenever the vexations and exactions of the governors rendered them unprofitable.

77. This is the reason why a vast extent of territory has remained untilled throughout the Ottoman Empire; this is why the agricultural products do not correspond with the fertility and ancient productiveness of the soil; and this, too, is why the population in the Ottoman Empire has never increased, but rather diminished or remained stationary for several centuries.

78. The amount of private land being very limited, and that of the State immense, the consequences of a defective legislation could not be other than such as have just been pointed out, and this legislation has contributed largely towards producing that decay which is everywhere seen in the Ottoman Empire.

79. It was in order to remedy such consequences that the Imperial ordinance of 1858 was issued by the Sultan Abd-ul-Madjid.

By that ordinance it was intended to render more stable the possession and the enjoyment of the *emîriah* or State lands; and, in order to encourage agriculture, an important step forward was made by it towards

vesting the almost free and absolute right of ownership of these lands in the cultivators.*

80. Its principal provisions are, briefly stated, these: The feuds, that is to say, the *Ziamets* and the *Timars*, are completely abolished, so that the holders of *emîriah* lands find themselves directly face to face with the Government, and not with those feudatories, who were intermediaries for the gathering of the taxes, and who served only to vex and molest the *rayahs*.

81. Further, the lands having on this wise been made to revert to the State, they are by it given to the cultivators, through the payment of a sum as a consideration, by way of investiture; and a deed of possession, called *tapu*,† is issued.

82. Having obtained the land, the grantee can cultivate it at his pleasure; but he cannot leave it without cultivation longer than three years, unless he is ready to have it taken away from him and granted to others.

83. On the other hand, he cannot plant it with trees having a full trunk, nor build houses thereon, without the permission of the governmental authorities. And this, because, according to the *Sharaa*, trees and houses become the *mulk* property of the planter and builder. So that, if the planting of the trees has been done regularly, there are two distinct proprietors,—to wit, of the land, and of the trees and buildings.

84. The grantee of *emîriah* lands obtained by *tapu* may sell or give them to others. But it is necessary to have the permission of the governmental authority, without which the sale would be void. This permission,

* The Turkish text of this ordinance bearing the Hedjirah date of 7 Ramadan, 1274 (April 21, 1858) was printed at Constantinople in the printing-office of the *Government Gazette*. Bélin gives a translation of this document, with highly important notes, in his work that we have so often cited, *De la Propriété en Pays Musulman*, p. 180.

† *Tapu* means act of servitude or vassalage, and is used to denote the title of possession of a tributary land, which title is issued against the payment of a certain sum, by virtue of which the right of occupancy, and of transmission of the land thus held to one's own heirs, is acquired.—Bélin, *op. cit.* p. 172, note 2.

however, amounts to a mere formality, and is never refused.

85. At the death of the grantee, the *emîriah* lands pass to his lawful heirs without any governmental permission or new grant. And if there are no heirs, not even of the remotest degree, the lands are given by *tapu* to the inhabitants of the village to which the deceased belonged.

86. But the grantee by *tapu*-deed cannot reduce to *wakf* the lands that have been granted him by that title, since the "immobilisation" (making inalienable) would transfer the right of property to a moral and indefectible body.

87. *Emîriah* land, obtained by *tapu*, may, however, be given in pledge, either by means of a sale, with compact of redemption, or by a deed of mortgage, given by the debtor to the creditor, authorising the latter to sell the land for satisfaction of the amount due to him. But the permission of the competent authorities is necessary to the validity of such an instrument.

88. The progress that has been brought about by this law throughout the Ottoman Empire is very great; for, after that the feuds were once abolished, the holder became almost the real proprietor of the lands. It cannot be said that he has become the absolute owner in *mulk*, because he has not the full right of disposal, the permission of the governmental authority being still needed to effectuate a sale, or mortgage them. It can be, however, likened to the *emphyteusis* of Roman law, and the lands possessed by him to the *ager vectigalis*, with this advantage that by the *tapu* the compensation is paid once only, instead of by a perpetual yearly rental.

89. It may, therefore, be said that, in the Ottoman Empire, besides the private *mulk* lands, there exist those, the *direct* ownership of which is in the State, but the *dominium utile* of which belongs, in the broadest manner, to the holders, who lack very little indeed of being absolute proprietors. And I believe it will not be long before the Government of the Sublime Porte will convert

this *dominium utile* into a true right of property in *mulk*, and this to the advantage of the State, because the lands of the State, thus granted by a title like that of the *emphyteusis*, being large in amount, such a conversion will be a great encouragement both to agriculture and commerce, by reason of the certainty that the possessors of such lands will have of keeping and transmitting them to their heirs, without fear of being deprived of them by Government.

§ V.—*Of Real Property in Egypt.*

90. Having determined the juridical position of lands in the Ottoman Empire, according to the *Sharaa* and according to the *Kânoun*, we have in great part determined also the position of landed estate in Egypt, which is one of its provinces.

91. But, as Egypt has always been, and will ever be, in an exceptional position in its relations towards the Empire, it is found to be subject to a peculiar *régime*, rendered necessary by the special quality of the country, soil, and climate, and by the beneficent river which traverses it, and without which no vegetation would be possible. Both nature and art must, in fact, work together in Egypt, in order, not only that the cultivable soil shall produce, but also that it may exist; because, if the co-operation of the one or of the other should fail, we should have nothing but dry sand and a wholly unproductive desert.

92. Egypt, as a country conquered by the Moslems by force of arms, had of necessity to be *kharâdjiah* as to its land; that is to say, tributary.

93. But there was a divergence of opinion among the Moslem doctors as to the juridical consequences of such a fact. Some held that, as *kharâdjiah* land, it had become national *wakf*, and therefore in the exclusive ownership of the State. Thus, Sidi Khalîl says:—*

* Bélin, *op. cit.* note 70, p. 35.

"The conquered country is 'immobilised' (rendered inalienable) into *wakf*, like Egypt, Syria, and the Irâk."

94. Makrizi, on the other hand, holds that in Egypt the right of property was left to the holders, and that they were only bound to the payment of the tribute, or *kharadj*:—"At the time of the Moslem invasion of Egypt, the Copts solicited from Amr a capitulation by and through the payment of the *djizyah*; that that general granted their request; and that, in exchange for this tribute, he confirmed in their hands the possession of the lands and other goods in full right of property; after which the Copts lent him their co-operation against the *Roumis*. If, then, Egypt was wrested by force from the latter, it was, on the other hand, occupied by capitulation (*sulhan*), as to the Copts."*

95. At the time, therefore, of the conquest, all the lands possessed by the Copts were in their full and absolute right of property, although *kharâdjiah*. And it would seem that no great quantity of land in Egypt then belonged to the State. But, if it is observed that the Copts did not constitute the whole of the population, and that there were in Egypt many Greeks, as well as heathen, with whom no capitulation was effected, and whose lands were therefore confiscated, it must be also said that the quantity of *emîriah* lands, too, was at that time not very restricted. And, naturally, it must very soon afterwards have increased through confiscation and by death without heirs.

96. The fact is, that from and after the time of Saladin, lands in Egypt were classed in the following manner, as Makrizi expresses himself, in this most important passage of his work:—†

"The Omayyade and Abbasside *Khalifs* gave the lands of Egypt, by grants, to the officers and other persons employed in their service. The amount of the *kharadj* laid upon the Egyptian soil was employed for the wages of the troops, and the surplus paid into the *beit-ul-mâl*.

* Makrizi, *Kitâb*, tom. ii. p. 492, cited by Bélin, p. 36.

† Bélin, *op. cit.* p. 117, note 266.

"The land granted remained in the hands of the grantee.

"Since the time of Saladin up to our days, the soil of Egypt has been classed in seven categories.

"The first is under the ministry of the house of the Sultan.

"The second comprises the lands granted to the *Emirs* and to the soldiers.

"The third comprises the *mawkoufeh* lands, set apart for the mosques, colleges, and convents, for pious works, and for the maintenance of the endowers of these establishments and of their freedmen.

"The fourth, the *ahbâs;* that is to say, those lands that are occupied by certain persons who enjoy them in remuneration for service rendered by them in the mosques, or for any other service.

"The fifth, the *mulk* lands; that is to say, the lands which can be alienated and donated, because they have been bought from the *beit-ul-mâl.*

"The sixth, those that cannot be brought under cultivation, and which serve as a place of pasturage and as fuel-beds.

"Lastly, the seventh, those that remain desert and sterile, the water of the Nile not reaching them."

97. It follows, quite evidently, from this exposition of Makrizi, that the full right of property (*mulk*) existed in Egypt as far back as the time of the conquest, and even afterwards. But that, on the other hand, the quantity of *emîriah* lands (that is to say, lands belonging to the State) was immense, of which the illustrious De Sacy gives us a most convincing reason.

He remarks, and demonstrates with great erudition, that not as early as the epoch of the conquest, nor by the fact of the conquest, did the lands in Egypt become the property of the State, but by successive revolutions and the consequent depopulation of the country.*

98. Afterwards, the lands were granted by Govern-

* De Sacy, *Recherches sur la Nature et sur les Révolutions du Droit de la Propriété en Egypte : trois Mémoires insérées dans les Mémoires de l'Institut*, tom. 1, 6, et 7. 1818 et 1823.

ment to the military feudatories, as throughout the rest of the Turkish Empire.

And if these feudatories, instead of being called *sipahis*, were called *multazims*, they were nothing else than the descendants of the ancient officers of the Turkish army, to whom the first grants of land had been made.

99. *Multazim* means literally a *responsible lessee*. And he was, in fact, nothing else than a grantee for life of one or more villages, having the right to gather the taxes on the lands and enjoy the *revenues* thereof to their full extent, provided only that he paid so much a year to the State,—that is to say, the amount of the imposts that were laid upon the villages held by him.

100. The right of property in the lands granted to him was not vested in the *multazim*, but a simple temporary usufruct and right of enjoyment thereof, with the option of being able to convey his rights to others, and also to transmit them by inheritance.*

101. He then distributed the lands of the villages to the *fellahs*, or peasants, that they might cultivate them and return an annual tribute or rental. Thus, too, it may be said that he had over these *fellahs* a sort of jurisdiction, in fact, a kind of proprietorship or lordship; because the *fellahs* were obliged to remain in the villages, and devote their labour to the cultivation of the lands that had been reserved to them under the conditions established by the laws and by usage.

102. Thus, no right of property in the lands belonged to the *fellahs*, and not even a true usufruct, but only the right to cultivate them and take the *products*, after the payment of the rental. This right could at the same time be called a duty, seeing that they could be constrained thereto even by force, to the end that the lands should not remain untilled and unproductive.

103. The Mamelukes succeeded to the Multazims in Egypt in the enjoyment of the lands granted them, and upon the same conditions. And this state of things continued until the French conquest.

* Worms, *op. cit.* p. 168, *et seqq.*

104. Général Reynier tells us, in his work, "De l'Egypte après la Bataille d'Héliopolis," that "Les *fellahs* sont attachés par famille aux terres qu'ils doivent cultiver; que leur travaille est la propriété des *multazims* ou seigneurs; leur sort est aussi affreuse que l'esclavage, quoiqu'ils ne puissent être vendus; ils possèdent, et transmettent à leurs enfants, la propriété des terres allouées à leurs familles; mais ils ne peuvent les aliéner, et c'est à peine s'ils peuvent en disposer par location sans permission de leurs seigneurs; si, excédés de misère, ils quittent le village, le *multazim* a le droit de les faire arrêter. L'hospitalité des *fellahs*, leurs semblables, et des Arabes, offre quelquefois un asile à leur fuite; mais les *fellahs* qui restent dans les villages qu'ils ont quitté, sont obligés de payer pour eux."

105. After the French, and when Mohammed-Aly became lord of Egypt, there was a great change. The Viceroy destroyed the Mamelukes, and did away with the *multazims*, from whom he took all the lands, and joined them to the *beit-ul-mâl*. Thus the State found itself possessed of the greater portion of the lands of Egypt.

106. Much was said at that epoch about the confiscation thus effected by Mohammed-Aly. But, in all strictness, it was not a confiscation, but a taking possession of lands left vacant by the death of the Mamelukes, and which reverted to the State; and a revocation of the temporary grants, made to the *multazims*, which were abolished.

107. In consequence of this, there ceased to be, as to the *emîriah* lands, any intermediary between the State and the *fellah*, who found himself directly face to face with the Government, and with which he had to deal. His condition, however, was not changed, and it was just what Reynier had, shortly before, described it. He was attached to the glebe, was bound to work for the State, could not leave his village, was subject to the *corvée*, and had no ownership whatever in the *emîriah* lands which he cultivated.

108. This explains why it was wont to be said that

Mohammed-Aly was alone the owner of Egypt, and that the *fellahs* worked for him. It further explains how the Viceroy could determine, every year, the kind of culture of all the lands, could appropriate to himself all the crops, and could thus exercise the widest monopoly that has ever been witnessed on the face of this earth. A monopoly, moreover, that was practised, from the earliest times, throughout all the Ottoman Empire, and to destroy which Europe, that had thereby experienced great losses, stipulated the commercial treaties of 1838, which abolished it wholly and once for all.*

109. It must not, however, be argued from this that all idea of the right of private property, by way of *mulk*, had disappeared in Egypt. That which existed in the other parts of the Ottoman Empire held good here also. There was private real estate, but it was very restricted in amount, and the greater part of the lands, especially those of the large farms or estates (*grande culture*), belonged to the State. What belonged to private persons, in *full* right of *mulk* property, was all the dwelling-houses in the towns, and also in the villages. Likewise, all gardens (or closes) adjoining the houses, and those situated in the neighbourhood of the towns, were private property. And in the interior of the country, also, there existed lands that paid the tithe, or *ushr*, and belonged to private individuals. But, I repeat, by far the greater part of the lands reverted, by reason of the abolition of the *multazims*, and the destruction of the Mamelukes, to the State, which thus united in itself the right of property and its enjoyment.

110. Mohammed-Aly, having once fixed himself firmly upon the throne of Egypt, and abolished the monopoly, and the wars that he, for so long a time, had been carrying on against the Porte having ceased, he saw the necessity of augmenting the private estates, so as to encourage agriculture throughout the country, and increase its population.

111. He, therefore, began to grant large tracts of

* *Manuale di diritto ottomano*, p. 127, *et seqq.*

land, in *mulk*, freehold, both to his own *employés* and to members of his numerous family (Tchift-liks), and also to Europeans, in order to encourage them to settle in Egypt; for he was convinced, and with reason, that only the presence and the example of Europeans could awaken the Egyptians out of their wonted apathy, and push them to engage in commerce, which they hated.

112. It was out of this that arose the so-called system of *ab'adiahs*, which signifies *an estate far off and separated from those already cultivated.* These estates were held in *mulk* (freehold), were subjected only to the pure and simple tithe, and sometimes even exonerated from this; and they were free from every kind of impost.

113. Besides the grants in *mulk* (freehold), or in *ab'adiahs*, Mohammed-Aly granted whole villages also to private individuals, that they might cultivate them and take the *increase;* and in compensation they were to take care and gather the taxes, and pay them into the State Treasury. Such grants were called *ohdahs* (عهدة), and greatly resembled the grants formerly made to the *multazims;* because, although the grantee was not the absolute proprietor of the village, still he disposed, at his pleasure, of the lands, and gave part of them to the *fellahs*, who had the right of cultivating them, but were bound to give their labour at fixed wages, and could not leave the village at their pleasure. Furthermore, the grantee of an *ohdah* was responsible toward the State for all the taxes that lay upon the village, and also for those that fell upon the lands granted to the *fellahs*, for whom he became responsible towards the Government.

114. Under the following reigns of Ibrahim Pasha and Abbas Pasha, no changes took place in the condition of the right of property in the lands. Abbas Pasha exercised the rights of the Government with, perhaps, greater rigour, but he did not render worse the position of the peasants who cultivated the Government lands (*emîriah*).

115. Marked changes, however, came about under the rule of Saïd Pasha, who was to so better the con-

dition of the *fellahs* as to make them, from the slaves that they were, into free citizens.

116. Throughout the Ottoman Empire, the reforms of 1839 had been effected. The laws of the *Tanzimât* had been published and carried out; and lastly, the *Hatti-Sharif* of 1856 had been promulgated.

117. In Egypt, notwithstanding the obstinate opposition of Abbas Pasha, the new reforms were to be published, and were to produce identical changes, this country being a simple province of the Empire.

118. Saïd Pasha caused all opposition to cease, and introduced and applied the new systems in Egypt even more resolutely, broadly, and liberally than had been done in Turkey. Among these systems, the most important certainly, and the richest in results, was that relating to the Governmental or *kharâdjiah* lands.

119. The Imperial ordinance of 1858, of which an extract has been given above while speaking of Turkey in general, had its counterpart in the Viceregal *règlement* of 1274 A.H. (A.D. 1858).

120. The Constantinopolitan ordinance could not be purely and simply adopted in Egypt; for Egypt has never had a system of administration identical with the Ottoman system; and, moreover, the laws were different, as we have had occasion to remark more than once.

121. Hence a relevant *règlement* was needed, which, while taking account of the differences, would introduce the broad and liberal system of the Imperial ordinances into Egypt also. Saïd Pasha did this by the *règlement* above mentioned, and in such a way as to outstrip the ordinances of Constantinople, and leave them far behind as to the goodness and liberality of their provisions.

122. I will pass the principal provisions of this *règlement* in review, in order, afterwards, to draw the conclusion that, by virtue of it, the *fellahs* in Egypt became almost full owners of the lands cultivated by them.

123. By the first article, that provision of the *Sharaa* is revoked, according to which the *kharâdjiah* lands cannot be transmitted to the heirs. And it was laid down that henceforth these lands should be transmis-

sible to both male and female heirs, with the sole condition of paying the tribute and cultivating them. Only in the case where the possessor leaves no heirs would the lands escheat to the *Beit-ul-mâl*.

124. After various rules, fixed by Article 2, as to the mode of distributing the Governmental lands among the heirs, Article 3 accords the right to the inhabitants of the village to which a person belongs who died without heirs, to obtain the lands left by him, and which would otherwise revert to the *Beit-ul-mâl*.

125. Further, the very important principle is established that any owner soever of these lands, after having held and cultivated them for five years, cannot be molested by any one, nor despoiled of his possessions.

And this provision is, properly speaking, a prescription of five years, which it was wished to introduce into Egypt, and which is still more clearly confirmed in Article 5.

126. After several rules relating to *absent* cultivators, and which are full of wisdom and moderation, Article 8 revokes another principle of the *Sharaa* relating to the granting and mortgaging of Government lands. In fact, as I have elsewhere remarked, the *Sharaa* denied to the holder the right of selling and mortgaging these lands.

The *règlement*, on the contrary, accords this right to the *fellah*, who can grant them under any title whatsoever; and hence can sell them, give them away, and also give them in pledge or mortgage, under the sole condition of giving information thereof to the local authorities, and of causing the same to be noted in the public registers.

And what is still more worthy of notice is this, that the *fellah* is permitted to make the sale by deed, containing an agreement of redemption, called *gharouka* (غروقة), so as it shall serve instead of a real mortgage, which latter is quite unknown to Moslem law.

127. By Article 9, the holder is given the power, at his will, to hire and to lease Government lands, and also to form companies for their cultivation. But herein there is attached to these privileges the obligation of

not exceeding the term of three years, and to make the contract before the local authorities.

128. Article 10 is also a very important one. It establishes the principle of indemnity, in case of occupation of the lands for works of public utility, such as canals, dikes, ditches, &c. It is provided therein that, if the lands occupied are those of the Government (*emîriah*), then, in such case, no indemnity is to be paid; but if the lands occupied belong in *mulk* (freehold) to private persons, the latter shall obtain from the State their price or value, or else other lands of like worth to those appropriated. After this, doubt is no longer possible that in Egypt the State is in duty bound to indemnify private persons every time that it occupies property belonging to them for and in behalf of public utility.

And this is an important progress that has been made upon the Ottoman legislation, which formerly did not recognise such a principle.

129. Another very important provision, tending to encourage agriculture, is contained in Article 25. By it the right is accorded to every one to occupy marshy lands, and those impregnated with salt, and bring them under cultivation, and this with exemption for three years from every impost, and for the three following years from the half of the ordinary taxes.

130. In Article 21, the right is granted to those of the military calling who return to their affairs, to hold and have Governmental lands that are not already possessed by others. It is provided that to the simple private soldier one feddan of land shall be given, and three to under-officers.

131. In Article 23 there are some noteworthy provisions as to the washing away of lands by the Nile, and as to the formation of new islets in it. They are not entirely in conformity with what is provided in similar cases by the Roman law, or by the laws of Europe. Still these provisions are animated by a sentiment of right that renders them worthy of high appreciation.

132. Article 25 has for its object the so-called *Rizquas* * and *Abaadiah* lands. The former are those given as an endowment to the mosques, with exemption from taxation. They are now abolished by this article, and are left to the holders as *athariah* † lands; that is to say, transmissible to the heirs, but without power to make them *wakf* of the mosques, to which latter a compensation in money has been accorded. As for the *Abaadiahs* donated by gift, it is provided that they shall be *mulk* property, *i.e.*, the absolute freehold of the grantees, who shall have power to sell, give away, and even make them *wakf*.

133. The brief examination I have made of the *règlement* of 1274 A.H., published by Saïd Pasha, is enough to show its immense importance and usefulness. Whilst by it nothing has been added to, or taken away from, what the Moslem law prescribes as to private property, it has recognised this class of real estate, and shown the greatest respect towards it; and as for the lands of the State, which hitherto were granted to the *fellahs* only *precariously*, it has converted them into freeholds, more absolute, perhaps, than would have been done by the Imperial ordinance of the same year published at Constantinople.

134. Inasmuch as the lands granted to the *fellahs* became susceptible of inheritance, both by will and otherwise, the same as *mulk* property, they could thenceforth be sold, given away, and even subjected to

* *Atyân Rizqua* were also lands granted out of favour by the Government, without price, without tax, and without the *ushur* or tithe, and which were at first granted to the *Omdahs* (notables) to supply them with a fund out of which *to entertain the stranger and help the poor;* for, according to the patriarchal system, the prominent personage of a village is bound to do this; and in compensation for their unremunerated services in helping to collect the taxes.—*Translator's note.*

† *Atyân Athariah*, that is to say, lands owned by a person, acquired by inheritance and transmissible by inheritance, whether they be at the time *ushuriah* or *kharâdjiah*, and over which he has the right of disposal by conveyance or otherwise, with the exception of the power to make them over to the mosque by *wakf*, they being originally grants of *emîriah* lands to the mosques or to the Omdahs. Strictly speaking they are usufructuary holds.—*Translator's note.*

mortgage-liens; in short, they became such in the hands of the possessor that he could be said to be the absolute proprietor; for to him were given all the rights and options that are comprised in the juridical idea of *dominium*.

135. Henceforth the Egyptian peasant could well say that he was sure the sweat of his brow would not be lost, and that his sons and descendants would be able to enjoy the accumulated fruits of his toil. What an encouragement to agriculture and for the civilising of the Arabs, who for so long a time have been subjected to nothing but the whims and extortions of their inexorable masters.

136. The useful effects of such a good law were not long in making themselves felt; and we were witnesses of this when we saw Egypt become one of the richest countries of the world, and be so placed as to supply, after a few short months, at least partly, the void that the American war had occasioned in the cotton-trade. We also saw the *fellahs* make up the void that a terrible plague had produced among those animals that are most indispensable to the agricultural existence of a country. If the *fellah* has been capable of so much, we owe it to the energy and activity he has displayed. And he certainly would not have put it forth unless a *régime* of freedom and security for the fruits of his labour had been introduced by the law of 1274 A.H.

137. This law, moreover, had such sanctions as were to put it beyond the reach of all violence. In fact, as early as 1272 (1856), there had been published, in Egypt, the Imperial ordinance of the Sultan Abd-ul-Madjid, which guaranteed to every Ottoman subject his property, under the shadow and sanction of very grave punishments, that are to be read in the following provisions:—

"Il ne sera permis ni à la Sublime Porte, ni au Viceroi actuel d'Egypte, ni à ses successeurs, ni à quiconque ce soit d'agir contrairement au firman concernant les héritages, et de porter les mains sur la fortune, ou la propriété de qui que ce soit.

"Personne, quelque soit la grandeur de sa position, n'aura le droit, par intrigues ou par menaces, de chercher à s'emparer injustement de la propriété d'un autre, ni de contraindre qui que ce soit d'une manière directe ou indirecte à lui céder sa propriété, ni même à la lui vendre.

"C'est un devoir d'empêcher quiconque ce soit de commettre l'acte injuste de s'emparer par force ou par surprise des biens d'un autre.

"Dans le cas où quelqu'un posséderait ces biens mal acquis, il devra être contraint de les restituer à celui, au préjudice duquel il s'en est emparé, soit en argent, soit en propriété.

"Dans le cas où ces objets n'existeraient plus en nature il devra être contraint d'en payer la valeur au propriétaire légitime.

"Cela fait, on procédera au jugement du coupable. S'il est employé du gouvernement il faudra le renvoyer immédiatement du service en châtiment de sa mauvaise action, qui est contraire aux règlements.

"S'il n'est pas employé du gouvernement on devra le condamner à l'exil pendant la durée d'une année."

138. To these severe prohibitions, which emanated from the chief himself of the Empire, Saïd Pasha wished to add others, so that the *fellah* might be still more secure in the enjoyment of his property. In fact, in that same year of 1274 A.H. he published a special *règlement*, which contains the minutest provisions as to every kind of offence against the property of others, beginning with landed estate, and ending with chattels of every nature that are used in agriculture.

139. It will be enough to give the first article, which more especially relates to the matter now under consideration:—

"Dans le cas où quelqu'un viendrait à usurper les biens et terrains d'un autre et les cultiverait, il devra être condamné à en payer le loyer au propriétaire, et à lui restituer la dite propriété.

"Il devra être, de plus, condamné à un emprisonnement qui variera de quinze jours à deux mois, et en

outre à une punition corporelle selon la condition du coupable."

140. Thus, then, we may conclude that there exist in Turkey and in Egypt such laws and regulations as establish the right of property in lands upon unshaken and sure principles. These laws are upheld by enactments against their disregard that are of the greatest severity, and are intended to ensure their fullest observance. The only wish, then, that we can formulate, and one that forms the exact counterpart of what we have said already, is that the good organisation of the tribunals in the Ottoman Empire be taken in hand as soon as can be; for, without this, we would be only too often brought to repeat the words of the divine poet:—

Le leggi son, ma chi pon mano ad esse?
(The laws are here, but who will apply them?)

§ 6.—*Of the Right of Foreigners to possess Real Property in the Ottoman Empire.*

141. We could not consider the study of the Ottoman laws on real estate to be complete unless we speak also of the right of foreigners to possess it throughout Turkey.

142. It has been said, and often repeated, that, according to Ottoman legislation, it had been forbidden, until the most recent times, to foreigners, coming to Turkey, to possess real property therein. Let us examine how far this is true, in the face of the various sources of Ottoman legislation.

143. And, first of all, let us see whether the religious law (*Sharaa*) is opposed to foreigners holding real property in Moslem countries.

144. *Multaqua-el-Abhur** says:—"Even if the term of one month's sojourn, or more,—three months, for example,—had been fixed for him [the foreigner], and he exceeds this limit, remains in the country, *and there*

* Bélin, note 113.

buys a piece of land, he shall be held to pay the *kharadj* for the land, and the *djizyah* for his person, counting from the day when he becomes bound to the payment of the tribute of the land."

145. And the *Sharai-Kebir* (a work on Moslem jurisprudence quoted by Bélin, page 115, note), says as follows:—"If a *mustamen* (foreigner having permission to dwell in Moslem territory) *buys or cultivates* a parcel of *ushuriah* or *kharâdjiah* land, he owes the *kharadj* for the land, and the *djizyah* for his person; still, he does not become a *dhimmi* by the fact of the purchase of the land, but only by the fact of cultivating it. The *kharadj* of the land carries with it, for the possessor, that of the person."

Lastly, the *Hidayah*, one of the most important of the works of the Hanafite Rite, expresses itself as follows (*lib.* ix. *cap.* 6, *pagina* 197):—"If a foreigner under protection (of a safe conduct), comes into Moslem territory, and there acquires a piece of land subject to the tribute, so that the tribute is imposed upon him, he becomes a *dhimmi*, that is to say, a subject; for the tribute upon the land is the substitute of the tax upon the person. * * * On the contrary, he does not become a *dhimmi* immediately after the acquisition of the land, nor until he begins to pay the tribute; for *a stranger may acquire land for speculation;* but, by becoming subject to the tribute, he also subjects himself to the personal tax for the following year, since, by submitting to the tribute, he becomes a *dhimmi*."

146. From these texts of Moslem jurisprudence, it appears, in all clearness, that the religious law (*Sharaa*) did not absolutely forbid the foreigner from acquiring real estate in Moslem countries, but subjected the acquirer to the payment of the *kharadj* for the land, and then of the *djizyah* for the person.

147. These imposts having been for ever abolished by the *Hatti Sharif* of 1839, and *Hatti-Humayoun* of 1856, and all sects in the Ottoman Empire having been put upon an equal footing, there is no difference, in Moslem law, between subjects and foreigners

as to the acquisition of real estate. Both are empowered to acquire and possess it, and are subject to the same imposts, as is the case in Europe. Nor in the Imperial ordinances, not even in those anterior to the more recent ones, that contain the reforms of the *Tanzimât*, do we find provisions which forbid foreigners from acquiring real property.

148. We find, too, in the preamble of the recent Imperial ordinance of 7 Safar, 1284, which regulates the matter in hand, that the right of real property is spoken of as a right exercised by foreigners also, about which there were only abuses and uncertainties which it was needful to remedy :—"Dans le but de developper la prospérité du pays, de mettre fin aussi aux difficultés, aux abus et incertitudes qui se produisent au sujet de l'exercise du droit de propriété par les étrangers dans l'Empire Ottoman."

149. If we wish to find prohibitions to the right of property of foreigners in Turkey, we must seek them in the European legislations, which forbid Europeans from settling permanently and perpetually in Moslem countries, perhaps out of fear that they might definitely abandon their own country; or, perhaps, also out of fear that they might, by force or for other motives, change their religion.

150. Thus, in the French ordinance of 1781, Title ii. Article 26, we read :—"Sa Majesté defend à ses sujets établis dans les échelles du Levant et de la Barbarie, d'y acquérir aucun bienfonds et immeuble outre que les maisons, caves, magazins et autres propriétés* nécessaires pour leur logement, et pour leurs effets et marchandises, sous peine d'être renvoyés en France."

Art. 28.—"Defend sa Majesté à tous ses sujets de prendre des biens-fonds, et autres objets à ferme soit du Grand Seigneur, soit des princes de Barbarie ou de leur

* And here it is to be observed how the same French law held that Frenchmen could acquire houses, stores, magazines, &c., and hence that the right of property in real estate in general was not forbidden by it, but only that of lands and other real property beyond what is necessary for their trade and commerce.

sujets, ni de faire des associations avec le fermier, tenancier, et autres, sous peine d'être renvoyés en France."

151. Thus, even in this prohibition by a European legislation, a proof is to be met with that the Ottoman law was not opposed to foreigners acquiring real estate in Turkey. Such a prohibition by European legislation would have been wholly useless if the Ottoman legislation contained it. Hence, if the former had it, that is as much as saying that it was possible, so far as the local laws were concerned, for foreigners in Turkey to acquire real property.

152. On the other hand, the actual fact in the case demonstrates the truth of what we have said. For, throughout the whole Ottoman Empire, but especially in Egypt, we see no inconsiderable amount of real estate belonging to Europeans, and which reaches back to quite a distant epoch.

And, indeed, under the rule of the Mohammed-Aly Dynasty in Egypt, besides not a few lands given to Europeans, the Government itself granted them many parcels of land, executing with them the contracts in the premises, wherein their right of property is fully recognised.

153. This being so, how, then, was the opinion formed that in the Ottoman Empire it was forbidden to foreigners to acquire real estate, even if the laws were not opposed thereto?

154. We think that this came from the circumstance that very often the Government authorities, and especially the subaltern officials, out of fanaticism or from hatred towards foreigners, threw obstacles in the way of Europeans acquiring real property, so as to hinder them from causing the same to figure in their own names upon the registers of the State. Thus, we have seen, in Egypt, the order given, under the rule of Abbas Pasha, to the *Câdis*, to grant no *hodjat* to Europeans who bought houses and lands from the natives. So that, although they remained in undisturbed possession and enjoyment of what they had purchased, no one

daring to molest them, still, they were not able, during the rule of that Pasha, to execute with the sellers the public contracts of purchase and sale before the *Câdi*.

155. But these were obstacles arising from acts that were arbitrary and unfounded in law, and that continued only for a time. In fact, immediately after the death of Abbas Pasha, his successor's Government revoked that order, and the *hodjats* were issued, and continued to be issued, to Europeans, without any difficulty. And perhaps it was from similar merely arbitrary acts, and from complete unacquaintance with Moslem laws, that the mistaken opinion arose, in Europe, that Ottoman law denies to foreigners the right of real property in Turkey.

156. But now, however, even those obstacles are no longer possible, in the face of the clearest provisions of the *Hatti-Humayoun* of 1856, which, in its 28th Article, says :—

"Comme les lois qui régissent l'achat, la vente, et la possession des propriétés immobilières sont communes à tous les sujets Ottomans, il est également permis aux étrangers de posséder des immeubles en se conformant aux lois du pays, et aux règlements de police locale; et en acquittant les mêmes droits que les indigènes, après toutefois les arrangements qui auront lieu entre mon gouvernement et les puissances étrangères."

157. By this article of law, the Porte did not undertake to introduce any new law or right; it did no more than confirm what had been prescribed by anterior laws, and, at the same time, it undertook to hinder the Governmental authorities thenceforth from laying obstacles in the way of their application.

158. Indeed, that article did not at all declare that thenceforth it would be permitted to foreigners to hold and possess. But it limited itself to enunciating, as an already existing fact, the right of foreigners to possess real estate in Turkey :—

"Il est également permis aux étrangers de posséder des immeubles."

159. This right of possessing thus recognised to foreigners is, however, subordinated, by that law, to certain conditions. Let us see what they are, and how they are to be interpreted.

160. These conditions are two:—I. That foreigners shall follow, in the exercise of this right, the laws of the country and the regulations of the local police,—"*En se conformant aux lois du pays et aux règlements de police locale.*" II. That foreigners shall pay the same imposts as the natives, after, however, as to such imposts, that an understanding shall have been come to with the Foreign Powers:—"Et en acquittant les mêmes droits que les indigènes, après toutefois les arrangements, qui auront lieu entre mon gouvernement et les puissances étrangères."

161. As for the first condition, it is in conformity with the soundest principles of law and right. For it is a consequence flowing out of the principle, admitted by all the legislations of Europe, that real estate must be entirely subject to the laws of the land where it is situated. There is, therefore, no difficulty in the observance of this condition by foreigners.

162. It must, however, be remembered that, when the laws of the country are spoken of, the capitulations and treaties of the Porte with the Foreign Powers are also to be counted among them; for these diplomatic instruments constitute a law that is in existence throughout the Ottoman Empire, and one which cannot be derogated from without the consent of those Powers. Wherefore, every time that it becomes a question of applying a law, published in Turkey, to foreigners holding real estate therein, this ought so to be done that the application thereof shall not clash with the capitulations and treaties of commerce, but be in keeping with them. The full import of these remarks will be seen hereafter, when we come to speak of a *règlement* recently published in the Ottoman Empire relative to the rights of foreigners in real property.

163. The second condition, also,—that relating to the tax,—seems quite reasonable, and such as to give no

room for serious difficulty. What could be wished for that would be more equitable than to see foreigners subjected to the same treatment as the natives. To claim a better and more advantageous treatment would be exorbitant.

164. But, on the other hand, this condition, so equitable and reasonable in appearance, did clash against the literal provisions of the capitulations, which declare that foreigners shall pay in the Ottoman Empire no other imposts and taxes than those indicated in them.

165. Thus, in the French capitulations, Article 63, it is written:—Les marchands Français et autres dépendants de la France pourront voyager avec les passeports . . . . sans que cette sorte de voyageurs, se tenant dans les bornes de leur devoir, puissent être inquiétés pour le tribut dit *Kharatch*, ni pour aucun autre impôt, et lorsque conformément aux capitulations Impériales ils auront des effets sujets à la douane, après y avoir payé le droit, suivant l'usage, les *pachas*, *câdis* et autres officiers ne s'opposeront pas à leur passage."

And still more clearly in the English capitulations, Article 13:—"All Englishmen, or subjects of England, married or not married, who shall dwell or reside in our states, whether they be artisans or merchants, shall be exempt from every kind of *tribute*."

The Austrian capitulations are the most explicit of all in this respect. Article 35 reads thus:—"By virtue of this propitious capitulation, the consuls, vice-consuls, interpreters, and merchants of His Sacred Royal Cæsarian Majesty, and all the servants that are actually in their service, shall be free and exempt from every TRIBUTE OR OTHER IMPOSTS."

166. Wherefore, by the capitulations all foreigners residing in the Ottoman Empire, after that they have paid the customs duties upon the merchandise that they import or export, are no longer bound to pay any impost, whether real or personal, even though the

natives may pay it.* This is clearly contrary to what is the practice in the countries of Christendom.

167. But how many provisions in Ottoman international law and right differ from those of European public law! This, however, is not to be wondered at, seeing that the two laws are essentially unlike, and are based upon totally different principles, as we have shown in another work.†

168. It is quite easy to find out the reason for this difference between the two in the matter of imposts. In Europe, from very early times, the taxes have been based upon certain and precise rules, have in them nothing arbitrary or vexatious, and are intended to supply the needs of the State; the caprice of the rulers has little influence over them. Hence the States of Europe did not find much difficulty in accepting, for their subjects, the principle of reciprocity, when the latter betook themselves into foreign countries, and could very well embrace the maxim that they should be treated like the natives.

169. But things have gone otherwise in the Orient, inasmuch as it is under Moslem rule. The imposts, whether personal or real, have never been fixed in a regular and rational mode. They have always been left to the whims and arbitrary will, I will not say of the Sultans, but of the governors of provinces. Thus, from the earliest times the system of the farming of the taxes has been followed, and so long as the sum required of a province flowed into the State Treasury, the gatherers and tax-farmers were free to impose any amount they chose, and there were no bounds to their greed. Some may think that recourse could be had against them to the provincial governor. But he too

* It is evident that these capitulations in favour of foreigners had reference only to personal taxes, and those upon personal property. As to taxes on real estate, they are imposts upon the land itself, which is subject to the local laws and in no way affected by the capitulations cited by the learned jurist. It is a forced and strained construction of the capitulations so to interpret them as to make them apply to matters of taxation of real estate.—*Note by Translator.*

† *Bollettino di Giurisprudenza*, year i. p. viii. preface.

got fabulous sums from the farmers, and joined with them in vexing and harassing the poor subject.

170. But in the matter of the taxes there was something even worse than this throughout the Ottoman Empire. The imposts were not the same for all subjects. For the Moslems were exempt from many taxes that weighed in the most fearful manner upon those of other religions. The *rayahs*,—that is to say, the Christians and Israelites,—were subjected to such and to so many imposts that these became unbearable, the more so that they were exacted in a humiliating and degrading manner.*

171. But foreigners, both Christians and Israelites (and all those who came from Europe were either the one or the other) were bound, by Moslem law, to be put upon the same footing as the non-Moslem subject. They were in fact called *mustâmin*, that is to say, *seekers of the amân, to wit security of their person.* For without a safe-conduct the non-Moslem foreigner could not remain upon Islamic soil, any one being free to kill him.†

172. And this *amân*, the security, namely, of his person, could not be given him but upon condition of his being treated like the native non-Moslem subject, and hence of being subject to all the *avanies* and taxes which the latter had to submit to.‡

173. Was it then possible, in the face of this state of things, that the European Powers, which dealt with the

* Bélin, *op. cit.* note 89, page 45.—"Le djizié a été ainsi nommé parceque c'est une taxe payée par le zimmi (non musulman) en compensation, en échange de la peine de mort encourue par lui en raison de sa croyance. Dès que le kâfir (infidel) accepte le payement du djizié il échappe à la peine capitale." Idem, note 102.—"Le zimmi début payera le djizié au musulman qui le recevra assis. Il sera saisi par le collet, secoué et apostrophé par ces mots. Eh! zimmi ou ennemi de Dieu? Paye le djizié."

† Bélin, note 133. "Mustamen se dit de tout *harbi* (hostis) qui vient dans notre pays sous la protection de l'amân."

‡ Bélin, *op. cit.* note 114. "Le mustemen ne peut resider une année entière en pays musulman; on doit le prévenir que s'il y passe une année, il sera soumis au djizié. Dès qu'il séjourne une année il devient *zimmi*, et ne peut plus retourner dans son pays."

Porte and negotiated capitulations with it, could permit their subjects to be subjected to the same imposts as the natives, and especially the non-Moslem natives? For them to have allowed it, would have been to render it impossible for their subjects to approach Islamic soil and settle thereon for the carrying on of commerce.

174. This, then, is why the capitulations expressly provide that, except the duties of customs, Europeans shall be subjected to no tax in Turkey.

175. On the other hand, the customs duties were fixed, and are to-day still fixed, at a figure high enough to make the assertion quite true that foreigners residing in Turkey do contribute, in their turn also, towards the ordinary imposts of the country, which taxes are thus paid by them under the head of customs dues rather than under their true name.

176. Hence it is a mistake to say, as Ottoman rulers are often wont to do, that foreigners are exempt from the imposts to which they subject their own people. For in reality they do pay them, but under another name, and under the head of customs dues.

This system had to be resorted to by reason of the bad systems that are in force throughout Turkey in the matter of taxes.

177. So long, therefore, as the system now in force is not changed by common agreement between the Powers and the Porte, it is not possible to subject foreigners holding real property to the imposts that are laid upon real estate possessed by natives. And this with reason, for in the *Hatti-Humayoun* of 1856 it is expressly declared that without this previous agreement taxes and imposts on real estate will not be exacted from foreigners.

178. All that remains for us to do is to examine whether this accord or agreement, which has not yet been realised, can take place, and under what terms and conditions. And it is now time to speak of the last Imperial ordinance of the 18th of June, 1867, published at Constantinople, relating to the right of foreigners to hold real property in Turkey.

This ordinance is nothing else but a project (draft)* formulated by the Porte, for applying to foreigners exercising the right of ownership of real property in Turkey, the two conditions we have spoken of above, and which are written in the 28th Article of the Hatti-Humayoum of 1856.

179. The 5th Article of this ordinance says:—"Tout sujet étranger jouira du bénéfice de la présente loi, dès que la puissance de laquelle il relève aura adhéré aux arrangements proposés par la Sublime Porte pour l'exercise du droit de propriété."

180. Could the Powers accept entirely and without precautions this draft or project formulated and presented by the Porte?

If they should accept it, then there would result the following consequences:—Namely, that two of the principal privileges that Europeans in the Ottoman Empire have, would be lost,—the privilege of exemption from every impost other than the duties of custom; and that of jurisdiction in cases where they are the defendants, and in cases where the question should turn, between two Europeans, upon real property. These are privileges that to-day the capitulations and usage, and custom accord them.†

181. In fact, Article 2 of that ordinance provides, without the slightest ambiguity, that foreigners, holding real estate, must:—

(i) Follow all laws and regulations, now existing, or that may hereafter be issued, concerning the enjoyment, transmission, alienation, or mortgaging of real estate.

* *Bollettino di Giurisprudenza*, year i. preface.

† It is true that some Powers have accepted this draft. But, until they have all accepted it, it is not obligatory, not even upon the former. And this by reason of the principle that is found written in the treaties of commerce of the Porte, that every nation has the right to be treated like the most favoured one. And as the new law abolishes some of the privileges that Europeans in the Levant have, it cannot be valid until all the nations have accepted it, as otherwise some Europeans would be treated in a different way from others. The Powers that have, up till now, accepted this draft or project are France, England and Austria. (March, 1869.)

(ii) Pay all taxes and contributions, of whatever kind, and under whatever form or name, that are now or shall be hereafter imposed upon real estate, whether it be city or country property.

(iii) Submit themselves completely to the jurisdiction of the Ottoman Civil Tribunals in every question relating to real estate, whether they be plaintiffs or defendants, and even when the question is between parties that are all foreigners, and no native having any interest in it.

182. We shall not here stop to repeat the motives and reasons upon which the privileges are based that would be destroyed by this article, for we have done this fully in another work.*

183. But we will say that these motives and reasons still exist, and render impossible the acceptance, by the European Powers, of this project, until the Porte has entirely reformed its system of imposts, and reformed the administration of the State in general, and, in particular, until it has established such Civil Tribunals as will inspire Europeans with faith, and published a code of procedure that shall indicate the mode of action before them; and lastly, not until a civil code shall be adopted which will make known to Europeans what legal principles are to hold good and be observed for the enjoyment, transmission, and alienation of real property.

184. All these things are wholly wanting in the Ottoman Empire. Above all, there is no civil code; and in order to know the principles that hold good in matters of real estate, it is necessary to recur to the religious law (*Sharaa*), which is most difficult of understanding, and which, even if understood, could never be accepted by Europeans.

185. The Imperial ordinances, and that of Ramadan 1276 in particular, refer wholly to the religious law for that which relates to private property (*mulk*). And this

* *Bollettino*, year i. p. viii. "*Dei Tribunali Locali, e della loro Giurisdizione di fronte agli stranieri.*"

law is full of intolerant and fanatical maxims, which must first be cancelled if it is seriously wished to permit foreigners to become real estate holders under the same conditions as the natives.

186. Tribunals are wholly wanting; for those that bear the name are precisely the contrary of what they ought to be, and every rule of procedure before them is also lacking.

187. And as for the system of taxation, although the most beautiful promises are to be read in the *Hatti-Sharif* of Gul Haneh, of 1839, and *Hatti-Humayoun*, of 1856, yet that which is still in vigour is defective beyond measure; and any amelioration of this system is impossible until the whole organism of Turkish Administration has been reformed, and until a way has been found for getting intelligent and instructed *employés* to whom to entrust it, which can never be attained unless law-schools are established in the Ottoman Empire.

188. It is true that every difference of Faith has been abolished in Turkey as to the matter of the collection of the taxes, and that the Christians are subjected herein to the same imposts as the Moslems. But from this no amelioration of the system is derived. The only result has been that both Moslems and Christians are equally maltreated and harassed by the Government.

189. The Ottoman Government ought to try and supply all these needs and wants, and then it will be able to propose the abolition of the privileges that are enjoyed by Europeans in Turkey by virtue of usage and custom.

190. But to propose this abolition before the reforms are published and put into practice seems to us to be laying oneself open to a refusal on the part of the Powers. In the actual state of things, these Powers must necessarily reject the project of the Porte as it is now formulated.

191. At the very most, in order to show themselves favourably disposed to alterations in the juridical relationships of the Porte with foreigners residing in Turkey, and in the belief that the Porte will adopt the reforms

required by the civilisation of to-day, and, so to speak, as a transitory system for the time being only, this draft or project might be modified in the following manner:—

1. That foreigners shall conform to all the rules and regulations, municipal and police, that regulate or shall regulate the enjoyment, transmission, alienation, and mortgaging of real estate, provided they do not contradict the provisions of the capitulations and treaties of commerce in force.

2. That they shall pay all the imposts and contributions that are laid or shall be laid upon real property, whether city or country, a veto, however, being reserved for the representatives of the European Powers near the Sublime Porte, in cases where such imposts shall be unduly high and vexatory. And, in the event of such a veto, then the pending question should be treated diplomatically, so as to arrive at an agreement, without which the impost should not be exigible.

3. That jurisdiction in all questions of property remain what it is at present acknowledged and recognised to be by the capitulations and by usage, until the Porte shall have adopted such a system of organisation of tribunals as can receive the approval of the Powers.*

* We do not believe that we ought in any way to modify the ideas set forth in this work, although the draft of the Ottoman law on real property has been accepted by some of the Powers. We believe that some precautions have been taken by these powers in the diplomatic correspondence that has passed between the Governments in order to arrive at this acceptation. We further know that other powers make a very strong resistance to the draft; and until the same ceases, it can never acquire the force of law, not even for those Powers that have accepted it. In any case, and even if all the Powers were to accept it, without precautions, we could only deplore the fact, which would show that the Governments of Europe have no exact knowledge of the true state of things in Turkey. Thus far, however, and although some Powers have accepted it, it has not been put into application, not even as to the subjects of those consenting, at least not here in Egypt, where the old system continues in full force, and the privileges hitherto enjoyed by Europeans as to their real property are respected as heretofore. This *mémoire* upon the Right of Real Property in Turkey had been already published in the *Revue historique de Droit Français et étranger, Septembre et Octobre*, 1867. We reproduce it in this work with a few additions and variations.

§ VII.—*Of Mortgage.*

192. According to the *Sharaa*, or Moslem religious law, it is lawful to pledge property, whether it be real estate or chattels, in guaranty for a debt.* But there is no difference in the nomenclature, whether the property pledged is real or personal; and in both cases the guaranty is expressed by the word *rahn*, which means a pledge or pawn.

193. It is defined in the *Hidâyah* thus:—"Rahn literally signifies the detention of property for and on account of some one. In legal language, it expresses the detention of property as against a loan, which may be satisfied by means of the property, as in the case of a debt."

194. An essential condition, in Moslem law, to the validity and efficacy of the pledge, whether it be real estate or a chattel, is that the possession be given to the creditor. There is not, therefore, in Moslem law, as there is in European, any difference between a pledge or pawn and a mortgage; for in either case the actual delivery of the possession of the property is needed.

195. The texts and authorities are not lacking in this respect:—

Multaqua-el-Abhur, as reported by D'Ohsson, in chap. xv. of the Civil Code, says: "Les gages et les hypothèques sont des suretés remises par le débiteur entre les mains de son créancier."

The Hidâyah, vol. iv. p. 189, expresses itself thus: "The taking possession of the property given in pledge is absolutely required for the validity of the obligation."

Macnaghten, in his *Principles of Mahommedan*

* The Moslem jurists base this principle upon an act of Mahommed, who, on the occasion of a contract for grain, made with a Hebrew, gave him in pledge his coat of mail to guaranty payment.—*Hidâyah*, lib. 48, of mortgages. As they find nothing in the Korân itself that could serve as a basis for the pledge, they have resorted to this make-shift, as they always do, so as to trace everything back to their Prophet.

Law, chap. xi. n. 14, says: "There is no difference between the pledging of lands and that of chattels. Mortgage is unknown to Moslem law, and the taking possession is an indispensable condition to the pledge of real property."

Elberling, *The Mohammedan Law*, p. 14: "According to Moslem law, mortgage and pledge is, by its nature, considered as a contract, which requires that the property given in pledge be actually delivered to the mortgage creditor or to another person in his name; for the aim of the contract cannot be attained without the delivery; that is to say, the mortgagee can keep the possession, as a surety for the fulfilment of the principal obligation; and in case of non-fulfilment, he can obtain payment by realising on the pledge, in preference to all other creditors of the mortgaging debtor. The actual delivery is, therefore, considered equally necessary both in the case of a mortgage or of a pledge."*

196. According to the Hidâyah, however, it seems as though it ought to be held that, after the pledge has been made, the creditor may lend it again to the debtor, so that the latter may enjoy the use thereof, without that the contract of pledge be thereby destroyed. At least, this is what it lays down as to goods given in pledge (*loc. cit.* p. 244): "If a person, after having received a slave in pledge, lends him to the debtor, in order that he may make use of his services, or for any other purpose, and the debtor takes possession of him, the slave will no longer be under the responsibility of the pledge-taking creditor. Hence, if the slave be killed or lost when in the hands of the pledging debtor, it cannot be held that by such a fact the creditor has received the payment of what is due to him; the slave

* With which authorities Tornau agrees in his *Le Droit Musulman exposé d'après les Sources*, part iii. chap. i. p. 169.—Pharaon et Dulau, *Le Droit Musulman*, p. 333, although he cites no authority, still I believe he expresses himself with exactitude when he says:—"Nous ne pourrons non plus nous occuper du régime hypothécaire; les pays de l'Islamisme ne le possèdent pas encore. Cependant le gage est connu et pratiqué de temps immémorial, et même dans certains pays musulmans l'antichrèse a été appliquée."

had gone out of his hands; and the possession of the pledging debtor, by virtue of the loan of the thing to him, is not equivalent to possession by the pledge-taking creditor, for the holding of a thing by way of a loan is against the holding of it by way of a pledge, seeing that the latter brings responsibility, whereas the former does not. The pledge-taking creditor, however, has the right of option to retake, at any time whatever, the pledge from the hands of the debtor, inasmuch as the latter holds it by virtue of a loan, which is not binding, and also because the contract of pledge still exists. Therefore, if the pledge-giving debtor should die without having restored the pledge, the creditor would, in such a case, have a right to it, as against the other creditors; that is to say, that he, before every one else, would have the right to obtain the payment of his due upon the pledge; and after that, if any part remained, it would have to be distributed among the other creditors."

197. And it is singular to see the Hidâyah, after having thus held that the pledge may be returned, as a loan, into the hands of the debtor, raise the objection as to whether, by so doing, the contract of pledge would not be destroyed; which is logical, seeing that this contract always presupposes that the thing pawned remain in the hands of the creditor. And this is the reply it makes to the objection:—

Objection.—"If a pledge-taking creditor is not responsible for a slave pledged to him, after that he has loaned him to the debtor, how shall it be supposed that the contract of pledge still subsists?"

Reply.—"Responsibility is not in every case one of the requisites of the contract of pledge. Indeed, the effects of the contract fall upon the child of a slave-woman given in pledge, even although this child be not an object of responsibility as to its loss or destruction. As, therefore, the contract still subsists when the creditor retakes the pledge from the debtor, so also the former becomes responsible for it, in the same way as before, he having again taken possession of it by virtue of the contract of pledge."

198. From this supposed case, the general principle might, perhaps, be deduced that, seeing the same legal principles may be applied to cases both of chattels and of real estate, the latter might be left under a precarious title and for the time being, or as an accommodation, in the possession of the debtor, in order that it might be enjoyed by him. And this would bring the conception of the pledge of real estate, according to Moslem law, very close to our mortgage.* For the contract could be made in such a way as that immediate possession be taken of the property, and then let it be kept in the possession of the debtor, with the right of option of the creditor to retake it again at any moment so as to preserve the pledge.

And, as a fact, we have examples of a pledge given, here in Egypt, with a regular deed or instrument, upon real estate, which latter was left in the possession of the debtor, as we shall see hereafter, when we come to occupy ourselves with the formalities prescribed by the Viceregal ordinances.

199. Moreover, according to Moslem law, property may be given in pledge without the delivery of its possession to the creditor, but by the possession being given to a third person to be held in the interest, and for the guarantee of the creditor.

Thus the *Hidâyah*, lib. 48, chap. iii. *Of Mortgages*, page 227, says:—"If the creditor and pledge-giving debtor agree to place the pledge in the hands of an honest person, who shall act as depositary for both, this is lawful.

"The pledge-taking creditor cannot take the pledge from the depositary, inasmuch as the rights of the debtor are still connected with the property in so far as

* I say it would bring it close to, but not render it identical with, our conception; for, according to European law, the juridical other than the material possession always remains with the mortgaging debtor. And, according to Moslem law, in the case here contemplated, only the detention and possession for the time being, are accorded to the debtor, whilst the true juridical possession remains in the creditor, who can obtain the material possession any time he likes.

this, that the right of possession of the pledge is given to a third person. Nor is the debtor free to take it again, for the rights of the creditor are connected with the pledge to the end of obtaining the payment of the debt. Neither of the two, therefore, can diminish the rights of the other."

200. The consequence then of the pledge of real estate that is admitted by the *Sharaa* is this, that the creditor has, over the property pledged to him, the preference before all the other creditors. This is in full keeping with the mode in which this pledge is brought about. For, the possession of the real property being granted to the creditor, such possession excludes all others therefrom; and therefore he must necessarily be preferred to all others.

201. Further, the same real estate may serve for two creditors, when it has been expressly pledged in favour of both. In such case possession is granted to one of the two, who holds it both in his own interest and in that of the other creditor. And if the one is paid by the debtor, the property passes to the other, who keeps it until he also has been paid.

Thus in *Multaqua-el-Abhur* (translation of D'Ohsson, Code. Civ. page 162):—"Un débiteur peut donner à deux de ses créanciers un gage équivalent à leur créances, et deux débiteurs peuvent engager à un créancier commun un bien également commun.

"Dans le premier cas le débiteur qui aura déjà payé l'un de ses créanciers ne pourrait rien reclamer de son gage, qu'il n'ait aussi pleinement satisfait l'autre."

Hidâyah, *loc. cit.* p. 224: "If some one pledge a determinate thing into the hands of two persons in guaranty of a debt that he owes jointly to both, that is lawful. If in this case the parties agree that the pledge shall be held alternately, each one of them is, during his possession, a depositary as towards the other. Likewise, if the debtor pays the debt owing to one of the two creditors, the thing in such a case remains entirely pledged in favour of the other."

202. Finally, according to the *Sharaa* it would seem

that it can be held that the pledging of real estate may be concluded in such a mode that the creditor shall have the usufruct and enjoyment, but upon the condition that the fruits or increase shall go toward the extinction of the debt. As a rule, the creditor cannot enjoy that which he holds by way of pledge, because this would clash with the principle of Moslem law, which strictly forbids all *usury*.*† But it is permissible to put into the contract a stipulation that the fruits of the pledge shall go towards paying the debt.

203. But, according to D'Ohsson, this form of pledge must be made by and through a simulated sale, the effects of which are identical with our *antichresis*. He says:—

"Les légistes modernes distinguent d'avec les ventes réelles absolues, *beit bath*, les ventes simulées hypothécaires. Celles-ci sont de deux espèces selon la nature des conditions arrêtées entre le débiteur et le créancier. L'autre renferme la clause de céder, au créancier censé acquéreur, les fruits de l'immeuble, en totalité ou en partie jusqu'au moment de l'entier remboursement de sa créance."

204. In the Mâlikite Rite this form of pledge, with the agreement for the enjoyment, seems to be still clearer, for we find in Khalîl Ibn Ishâk (Perron, vol. iii. p. 536) as follows:—"Mais il est permis au prêteur de stipuler qu'il jouira des produits du gage en déduction de la dette, car l'époque de payement d'un prêt peut rester inconnue, indéterminée."

205. From these modes of pledging real estate in guaranty for the payment of debts, it can easily be seen that all possibility is excluded of the legal or judiciary mortgage (judgment-lien), of which no trace is to be found in the books of Moslem jurisprudence.

And, in truth, how could it be that, by the fact of a judgment or provision of law, the right of pledge or lien upon real estate could be acquired when the principle is admitted that the latter must always be

* According to Moslem law no interest is allowed, and consequently the words "*interest*" and "*usury*" are synonymous.

† *Hidâyah*, *loc. cit.* p. 199.—Elberling, *loc. cit.* p. 76.

delivered to the creditor, and when the consent and delivery of the possession by the debtor is always presupposed?

206. Hence, without fear of erring, we can say that mortgage or judgment-lien, such as we understand it according to European laws, and which consists in a right of lien upon the real estate of another, for the guaranty of what is due to us, without acquiring the possession thereof, which possession remains with the debtor, is wholly unknown to Moslem law.

And every time that mortgage or hypothec is spoken of in the books of Moslem jurisprudence, translated into European tongues, this must be understood to mean that the real estate always passes into the possession of the creditor, and never remains with the debtor, or remains with him under a precarious title only, which is revocable any moment at the will of the creditor. Or, in other terms, Moslem jurisprudence recognises the sole right of pledge or pawn, which covers both real estate and chattels, and which can never correspond with the mortgage or lien of European jurisprudence.

207. Another marked difference between European and Moslem laws as to the pledge of real estate is that relating to the rights that the creditor acquires over the property pledged. Whilst, according to European laws, the creditor can forcibly obtain the sale of the pledged property, according to Moslem law, on the contrary, the consent of the debtor to such sale is always needed.

And if the debtor does not pay his debt, the creditor may prosecute him at law and also have him put into prison and kept there until he shall have paid, whether by voluntarily selling the property, or by some other means. But a forced sale cannot be brought about, and the creditor will have no other right than to keep the property in his hands until the extinction of the debt.

208. *Il Multaqua*, translated by D'Ohsson, clearly enunciates this principle in the chapter that has been cited:

"Un créancier hypothécaire, qui n'est pas satisfait

au terme convenu, peut poursuivre en justice son débiteur, et même exiger son emprisonnement. Il a le droit de garder la totalité du gage, jusqu'à l'entier payement de sa créance, quand même il aurait reçu des à-comptes.

"Mais il ne doit ni en faire usage, ni en tirer profit, moins encore en disposer en faveur d'un tiers, ou le vendre, sans le consentement formel du propriétaire.

"De son côté le débiteur actionné peut requérir l'exhibition du gage, pour s'assurer pleinement qu'il existe entre les mains de son créancier."

Macnaghten, *loc cit.* n. 16:—"The creditor has no right of option to alienate and sell the property pledged, unless there be an express agreement to this effect between him and the debtor."

Elberling, *loc. cit.* p. 83:—"The creditor has no right to sell the property pledged to him without the consent of the pledging or mortgaging debtor; if he sell without the latter's consent, the sale will not be void, but voidable."

El Hidâyah, lib. 48, cap. 3, p. 231:—"A pledge-taking creditor has no right of option to sell the pledge without the consent of the debtor, for the right of property belongs always in the most absolute manner to the latter."

209. By Moslem law,* therefore, the right of forced sale of real estate, for debts, is wanting, whereas it is one of the essential consequences of a mortgage, according to European law; the only right of the creditor being to cause the debtor to be imprisoned and kept there until he shall have satisfied the debt. But during the imprisonment he has the free right of disposal of his property, which he alone can administer and sell. Thus, *Il Multaqua*, cited by D'Ohsson, *loc. cit.*:—"Mais tout débiteur qui n'est pas insolvable doit garder la prison

* When I speak of Moslem law I always mean to refer to the Hanafite Rite or School, which is the one in force throughout the Ottoman Empire, which Rite quite often differs from the others. And in the case of forced sale it differs essentially from the Mâlikite Rite, which is in force in Algiers and in Morocco, as we shall see hereafter.

jusqu'à ce qu'il se détermine à payer ses dettes. S'il s'obstine dans ses refus son emprisonnement doit être perpetuel. Quoique incarceré, il n'appartient qu'à lui seul de régir ses affaires absolument à son gré, de vendre, d'aliéner ses effets, de composer avec ses créanciers; il peut enfin agir dans tout ce qui le concerne sans gêne, ou contrainte. Pas même de la part des magistrats, dont l'office se borne à le détenir en prison jusqu'à ce qu'il ait acquitté ses dettes."

210. Thus, whether there be or whether there be not a mortgage or pledge, the sale of the property of the debtor can never be proceeded with, according to the *Sharaa*, by action at law or by other legal ways; but the debtor's express consent is always requisite. When this consent is not given, the only means remaining for the creditor is that of trying to coerce him by imprisonment, which may be continued indefinitely, and is thus both a way of coercion, and, at the same time, a punishment for the debtor's refusal to sell and pay.

211. There is, however, a case in which the magistrate can, according to the *Sharaa*, order the forced sale of the debtor's property; and this is when his debts exceed the assets of his patrimony (or inheritance), and he has not wherewith to pay them all. When once this is proved, the creditor may apply to the magistrate, in order to have his debtor declared bankrupt, the chief consequence of which is *interdiction*, which deprives him of the right of free disposal over his property, which may be sold by the judge to pay his creditors.

Thus, in *Multaqua-el-Abhur*, *loc. cit.*:—"Le cas d'un failli est différant; soumis à une interdiction formelle, il a besoin de l'autorisation du magistrat pour tout acte civil, et pour toute opération relative à ses biens.

"Et s'il refuse de prendre les mesures nécessaires, le magistrat doit procéder d'office à la saisie et à la vente publique de tous ses biens, d'abord des mobiliers, ensuite des immeubles, pour en repartir le net produit entre les créanciers, au *pro rata* de leurs créances respectives."

212. As to these effects of the civil bankruptcy of the

Moslems,—which has so many points of contact with our failure of merchants,—it seems that all the Rites, or Schools, are agreed. For, if Khalîl Ibn Ishâk, translated by Perron, be consulted, in the chapter on *Credits*, or debts due (vol. iv. p. 1 *et seqq.*), it will be seen that, according to the Mâlikite Rite also, bankruptcy produces interdiction, may be ordered by the magistrate when the liabilities of the debtor exceed his assets, and gives the right to forcibly sell the latter's property, in order to divide the proceeds among the creditors.

213. The Mâlikite Rite differs, however, from the Hanafite in this, that the former permits the forced sale also, in the case of a pledge of real estate, which, as we have seen above, is forbidden by the latter. Thus, Khalîl Ibn Ishâk, translated by Perron (vol. iii. p. 545), says:—"Dans le cas où le débiteur s'opposera à la vente du gage, et n'aura de quoi acquitter sa dette, ou se refusera à la payer, bien qu'il puisse l'acquitter, l'autorité compétente, à laquelle d'ailleurs le créancier aura du préablement en referer, ordonnera la vente au nom du débiteur. Il en sera de même si le débiteur est absent, lors de l'échéance, ou s'il n'existe plus."

214. In our opinion, this difference between bankruptcy and solvency, which the Moslem law of the Hanafite Rite makes, is worthy of notice. For it is wholly contrary to our European legislations, and shows that the simple existence of a mortgage, or pledge, upon the property of a debtor is not enough to produce the forced sale of the object pledged; whilst, on the contrary, according to our laws, such forced sale, or foreclosure, is an inevitable consequence of the pledge, or mortgage, and ensures the full usefulness and efficacy of the latter.

215. I have remarked that the thing given in pledge may not be sold to the loss of the debtor, and for obtaining payment of the debt, without his consent. This consent may be given, however, either at the moment of the falling due of the debt, or from the very outset; that is to say, in the same contract by which the pledge is given. In which latter case, the consent is given in

the form of a mandate or power conferred, either upon the creditor or upon a third party, to sell the property pledged, to the end of effecting, with the proceeds of the sale, the payment of the debt at the time it falls due.

Hidâyah, *loc. cit.* p. 230 :—"If the debtor appoints the pledge-taking creditor, or any other trustworthy person, as his mandatory [attorney] for selling the property, in order to effect the payment of his debt at the expiration of the term stipulated, such a power of attorney is valid, for in such a case the debtor has done nothing else than appoint an agent for the sale of his property. Hence, if this power of attorney has been expressed as one of the conditions of the pledging contract, the debtor has not the right afterwards to revoke it; for, when the mandate, or authorisation, has been stipulated in this wise, it constitutes one of the rights growing out of the contract, and, therefore, produces an obligation in consequence of the contract itself; and, moreover, because the right of the creditor is connected therewith, the annulling of that obligation would be the destruction of this right."

216. And if the person entrusted to sell the property refuses to do so at the fixed term, that person may be forced thereto by the competent authorities, and with all means of coercion.

Hidâyah, *loc. cit.* p. 231 :—"If, at the expiration of the stipulated term for the payment of the debt, the agent refuses to sell the property put in his possession for that purpose, and the debtor hides himself, the *Câdi* ought to force him to execute the sale, either by imprisonment or by other coercive measures."

217. Furthermore, this power to sell, conferred upon a third party, is irrevocable, as results from the passage already cited. There is nothing but the death of the mandatory, or attorney empowered to sell, that can extinguish it.

Hidâyah, *loc. cit.* p. 230 :—"If the pledge-giving debtor die, the power of attorney to sell still subsists, notwithstanding his death. For, as the contract of

pledge does not become annulled by the debtor's death, neither can this power of attorney cease, it being expressly included in the contract. * * * Likewise, if the pledge-taking creditor die, the power of attorney is not extinguished, because the contract of pledge is not annulled by the death of both or of one of the parties, but continues as before, with all its rights and privileges, to wit, possession, execution, and also the power of attorney under discussion. On the contrary, the powers and duties included in the deed of attorney cease at the death of the attorney, and his heir and successor cannot take his place, for the attorneyship does not form a part of his heritage, as it must be held that the constituent had faith in the mandatory alone and in no other person."

218. Having thus established the principles that hold good, according to the *Sharaa*, or Moslem law, in the matter of pledging real property, let us see whether they have received any modification through the recent Imperial ordinances, and through the civil *règlements* published by Moslem rulers.

219. It is a fact that, in the Imperial ordinances and *règlements*, mortgage is often spoken of. It is spoken of in the Code of Commerce,* Article 277; in the Law on the Right of Real Property of 7 Ramadan, 1274; in the Laws on the *Emîriah* lands and *Maukoufeh* lands, of May 21 and June 10, 1867; and, as to Egypt, in many Viceregal ordinances.†

220. But it is also a fact that mortgage is spoken of therein in such a way as to refer to a system already in force, and not at all with the intention of making modifications or variations in this system. Moreover, there exists no law, or *règlement*, which takes this subject-matter especially into view, and has for its purpose to regulate it. Hence, when we find the Imperial ordinances and *règlements* speaking of mortgage, it must be held that they speak of it in the purely legal sense, according to the canonical books, and with all the

* *Manuale di Diritto Ottomano*, p. 332.

† *Bollettino di Giurisprudenza*, year ii. pp. 104 and 109.

chief characteristics that are prescribed for it by the *Sharaa*.

221. Among the Imperial ordinances that speak, with a certain latitude, of the mode of guaranteeing debts owing through the means of real estate, we must mention that upon Real Property, of 7 Ramadan, 1274.*

222. In that ordinance, no provision is to be met with relating to the pledging of real property, which is delivered to the creditor, and which corresponds more nearly to our mortgage. On the contrary, there are to be found in it, in Article 117, provisions relating to the power of attorney to sell real estate granted to the creditor, or to a third party, in guaranty of a debt, to which deed is given the name of *Mandat hypothécaire*, the effect of which is that if, at the expiration of the term agreed upon, the debtor has not paid what he owes, the creditor, or the third party, can proceed to sell the property, in order to pay the debt with the proceeds. Here are the very expressions of the Article:—

"Si le débiteur * * * se trouve au délai fixé dans l'impossibilité d'éteindre sa dette, et investe son dit créancier du mandat *devriée*, c'est-à-dire, s'il substitue celui-ci complètement à lui-même, en se dépouillant de la faculté de lui retirer le dit mandat, et lui donnant pouvoir de vendre, ou de faire vendre, les dites terres, de se rembourser sur le prix de vente du montant de sa créance, et de lui compter le surplus; dans ces conditions le créancier mandataire pourra, en cas de non-payement jusqu'au terme fixé, vendre, ou faire vendre, le dit champ, du vivant de son débiteur, par l'entremise de l'autorité, et se payer du montant de sa créance; ou bien si, comme il a été dit, le mandant débiteur a chargé un tiers de ses pouvoirs, celui-ci pourra, à l'éxpiration du terme fixé, et, en vertu de son mandat, vendre les terres et acquitter entre les mains du créancier la dette de son mandant."

* Bélin, *Étude sur la Propriété Foncière*, p. 258. An extract of this law has been given *ante* in § IV.

223. In these provisions of the Imperial ordinances we find the confirmation of the system established by the religious law, unfolded above by us, to wit, that, for the purpose of guaranteeing an amount owing, real property may be given in pledge, with authorisation to the creditor to proceed to the sale of the same, in order, with the price thereof, to obtain payment of his due.

224. This system of the *mandat hypothécaire*, is, therefore, to be held as an efficacious means for the guaranty of a debt, and such as to produce those effects of a mortgage that are the most useful.

225. Again, Bélin, in notes to this Article, gives a formula for this *hypothecary mandate*, which he says he met with in a document of like nature. It reads thus :—

" Le Sieur N., en garantie de sa dette, envers N. donne à celui-ci une hypothèque générale sur tous ses biens et designe un tiers le sieur N. pour son mandataire, à l'effet de vendre ses dits biens hypothéqués, s'il n'a pas acquitté sa dette à l'échéance envers son créancier, et de verser le montant de vente entre les mains du dit créancier, jusqu'à concurrence de l'avoir de ce dernier."

226. From which formula, and also from the text of the ordinance, it appears to me to result clearly that in the case of the *mandat hypothécaire*, it is not even necessary that the mortgaged property pass into the possession of the creditor or of the third party, but that it may remain in the possession and occupancy of the debtor, for whose account it may be sold at the falling due of the debt, recourse being had, if necessary, to the intervention of the magistrate. In such a case, the juridical possession would pass to the creditor, the actual possession of the property remaining with the debtor.

227. And of this I believe to have found a confirmation in a deed of mortgage executed in Egypt, and of which I here transcribe the more important clauses.*

* This *Hodjat* of Mortgage, the full copy of which I have in my hands, was drawn up at the *Mahkamah* of Tanta, Province of *Gharbiah*, under date of 12 Dhil-Ki'adah, 1282 [March 29, 1866], and registered

After the description of the property mortgaged, the contract, deed, or *Hodjat of hypothecation*, contains the following clauses:—"These lands are within the ownership and in the possession of the mortgagors, who can legally dispose of them, to the exclusion of every one else, up to this day, as appears from the two legal *hodjats* drawn up in the *Mahkamah* of *el Mihalla-el-Kubra* of the afore-indicated date, and are within their possession for a space of time longer than that required by the *Règlement upon Lands*, without any co-proprietor, and without any one having claimed rights over the same, as do attest all the witnesses aforenamed and interrogated after the legal modes; and the said mortgagors have the right to lawfully mortgage the said property, and give it in true and legal hypothecation; which mortgage has been accepted by the two said gentlemen (the creditors) by way of legal acceptance, they acknowledging to have received delivery of the said lands, without any reservation on the part *of the aforesaid mortgagors;* which delivery has been made after the legal mode. And the aforesaid Hassan Pasha and Ibrahim Pasha have permitted and empowered Mr. B. A. (one of the creditors) that, if at the expiration of the term fixed neither the afore-mentioned sum nor any of the five aforesaid instalments shall have been paid, he can sell in their name a quantity of the aforesaid lands sufficient to satisfy the sum due, at its just value, and without fraud, by means of a note of auction; and Mr. B. A. has accepted this permission and power for himself, and by legal acceptance."

From these expressions, it would appear to follow that the possession of the lands was actually delivered to the creditors, whereas in reality it was not; they remained in the possession and occupancy of the debtors. So that the delivery was simulated; or else it may be interpreted thus, that the lands were left in the possession of the debtor under a precarious title, and with the

in book 67, folio 20, and in *Mazbatah*, No. 55–56, lib. xii. I was able to follow all the phases of this mortgage, which lay upon a vast extent of land, and was intended to guarantee a very large sum of money.

power vested in the creditors to retake them at will. Afterwards, when the debt fell due, it was not paid, and the creditors caused a note of auction for the sale of these lands to be circulated, which they would have effected had not a settlement been made between the parties.

228. Furthermore, without this *power to sell*, expressly conferred upon the creditor or upon a third party, even the Imperial ordinance (in this respect fully in conformity with the principles of the *Sharaa*) denies to the creditor the right to force the debtor to sell his lands.

In fact, Article 115 reads as follows :—"Le créancier ne peut s'emparer, en échange de sa créance, de la terre possédée par son débiteur, il ne peut non plus le forcer à vendre pour, sur le montant, se rembourser de sa créance."

229. But in the Imperial ordinance we find, besides this *hypothecary mandate*, another system for the guaranty of debts, which produces the effects of a mortgage, and which it is important to examine, because we find it in the laws of Europe, as well as admitted by the *Sharaa*. I mean sale, with the agreement of repurchase,* or *à réméré*.

230. In Article 116, the ordinance speaks of this as of an efficacious means of guaranteeing debts. After having said that the lands of the State (*emîriah*) and the *wakoufs* (*maukoufah*) cannot be given in pledge, because the full right of property thereto is not vested in the holder, it adds :—"Toutefois si le débiteur, en échange de sa dette, et par l'entremise de l'autorité, vende à son créancier la terre dont il est possesseur, à condition que celui-ci la lui rendra à toute époque où il acquittera sa dette, ou s'il en fait la vente simulée et *hypothécaire* dite *Firâgh-Bilvefa*,† c'est-à-dire qu'à toute

* Or Right of Redemption.—*Translator's Note.*

† This simulated and hypothecary sale, as it is practised in the Empire, is spoken of in the ordinance concerning property *emîriah* and property *maukoufah* of May 21, 1867. (See *Bollettino di Giurisprudenza*, year ii. p. 104, art. iii.) "Le régime de *Firâgh-bil Wafa usité pour constituer le bien-fond en garantie d'une dette*," *etc. etc.*

époque où il acquittera sa dette, il aura droit de réclamer l'immeuble, ce débiteur ne peut, avant l'extinction préalable de sa dette, qu'il a ou non fixation de terme, en exiger la restitution ; il ne peut reprendre la terre qu'après acquittement intégral."

231. I have said that this sale with the agreement of repurchase (redemption) is recognised by the *Shara*, or religious law. Here is the proof. Muradgea d'Ohsson (tom. vi. p. 73), as an appendix to the treatise of *Multaqua-el-Abhur* upon sales, observes :—" Les légistes modernes distinguent, d'avec les ventes réelles absolues *beït-bath*, les ventes simulées et hypothécaires ; celles-ci sont de deux espèces, selon la nature des conditions arrêtées entre le débiteur et le créancier. L'une *bei-bil-vefa*" (which the ordinance speaks of in the above-cited passage) " a pour objet de donner un nantissement à un créancier, tenu de son côté de restituer l'acte de vente en cas de payement à l'époque convenue. L'autre *bei-bil-istighlâl* renferme la clause de céder au créancier censé acquéreur, les fruits de l'immeuble en totalité ou en partie jusqu'au moment de l'entier remboursement de sa créance.

" Dans ces ventes simulées ce n'est qu'à l'expiration du terme convenu que le créancier devient réellement propriétaire de l'immeuble ; mais il ne peut le vendre à un tiers sans le consentement formel du débiteur, ou à son refus sans la permission de la justice."

And Elberling says :*—" A mortgage, for securing the payment of moneys loaned, upon the condition that, if the money is not restored within a determinate time (with or without interest), the mortgaged property becomes the property of the mortgagee for the sum loaned, is in general called *Bai'-bil-Wafa*, or *Kut cubbalak*. Under Moslem law, it is questionable whether this kind of contract, which amounts to a sale subject to a condition, can be valid ; but it is, without doubt, valid according to the *règlement*.† In this kind of

* Elberling, Treatise, *op. cit.* p. 77.

† As will be seen in the following paragraphs, although some Moslem jurists raise doubts as to the legality of such a sale,

mortgage, the possession of the property mortgaged can be transferred to the creditor, or may continue with the debtor."

232. We find still more exact notions of this sale, with the agreement of repurchase (redemption), in a work of the Hanafite Rite, much followed throughout the Ottoman Empire, to wit, the *Feteva Alumgiri*, otherwise known under the title of the *Fatâwah Hindiyah.**

233. It is clearly stated therein that this sale is in reality a pledge, and produces all the effects of such. It is also thus spoken of in a Moslem work on law cited in that collection: †—

"The sale which is practised in our times as a means of avoiding usury (*riba*), and to which is given the name of *Bai-il-wafa*,‡ is in reality a pledge, for the land sold remains in the possession of the seller. * * * In our opinion, there is no difference between this contract and the pledge in any of its effects or consequences."

234. The formula by which such a sale can be made, according to the collection of *Fatwas*, is as follows:— "The seller says to the buyer: '*I have sold you this land for the debt I owe you, with the condition that when I shall pay the debt, the land shall be mine.*' Or else: '*I have sold you this land, but on condition that when I*

yet the majority of them, and a constant usage, hold it to be quite valid.

* This important collection of *Fatwahs*, *i.e.*, of opinions of Hanefite Muftis, was ordained by the Indian Emperor *Aurumgzebe Alumgiri* about the year 1670, whose name it took. It is also known under the name of *Fatâwah Hindiyah*, or *Indian Fatwas*, because made in India and for the Moslems of that country. But inasmuch as the prevailing Rite throughout India is the Hanafite, this collection serves also in the Ottoman Empire, which likewise follows it. Of those *fatwas* contained in this collection, relating to sale, we have an English translation by Neil B. E. Baillie, under the title "The Moohummudan Law of Sale according to the Huneefeea Code from the Futuwa Alumgeeree," London, 1850; and it is from this translation that we have taken what we say in this respect.

† Work cited, book i. chap. xx. p. 301.

‡ *Wafa* means fulfilment of a promise, and *Bai-bil-wafa* is as much as to say, a sale with a promise to be fulfilled.

shall restore you the price, you shall return me the land. Thus is it in the Bahr-ur-Râik.'"

235. It is true that, among Moslem jurists, there are some who hold such a sale void, and contrary to the maxim which forbids every sort of usury. But the majority is for its validity and legality. Indeed, we have seen that D'Ohsson, in the place above cited, declares it to be in use in Turkey. And as for India, where the same Rite prevails, it is likewise practised and held to be fully legal. In this connexion, Baillie, after having remarked that the *Hidâyah* allows it, expresses himself thus in his work already quoted:—"The *Bai-el-Wafa*, as it is nowadays practised in the British territories of India, and sanctioned by the regulations of the British Government, contains the agreement that, if the sum loaned shall not be restored (with or without interest) within a fixed term, the sale becomes final. And it is remarked in the preamble to Regulation I. of 1798, that for a long time the practice has prevailed of loaning money on mortgage of real estate by means of such a contract. And it is probable that the fear of losing the lands in case of non-payment at the time fixed was the reason of the adoption of such a system, as a means of eluding the prohibition of usury (*riba*)."

236. Thus, sale with the agreement of repurchase (redemption),—whether because it is admitted by the majority of Moslem jurists, whether because it has been for a long time practised in countries of the Hanafite Rite, or, lastly, because it is recognised by the recent Imperial ordinances,—must be held to be a valid and lawful means of guaranteeing the payment of debts; and, also, further, as the means which, more than any other and with greater certainty, produces the useful effects of mortgage, which is wanting in Moslem law.

237. According, therefore, to Ottoman Law, the legal modes whereby real estate may be given in guaranty for debt are the following:—

(i) The delivery of the possession of the property to the creditor, who has the right to keep it until he has

been paid his due, which corresponds to our pledge, or pawn (*rahn*).

(ii) The *mandat hypothécaire*, whereby the right and power to sell the lands at the time the debt falls due are conferred upon the creditor, or upon a third party, to the end that the creditor be paid out of the proceeds of the sale, and, if anything remain, it is given to the debtor (*wikâlah dawriyah*).

(iii) The simulated hypothecary sale, with the agreement of repurchase, or redemption (*à réméré*, according to French law), by virtue of which the creditor buys the lands, and becomes the absolute and indispossessible proprietor thereof, if, at the expiration of the term agreed upon, the price paid is not restored to him (*Bai-bil-wafa*).

(iv) The delivery of the property to the creditor, with the right and power to take the fruits, rents, and increase thereof, until he is fully paid, which corresponds to our antichresis (*Bai-bil-istighlâl*).

238. Of these various modes of guaranteeing the payment of debts by means of real estate, not one answers to our mortgage, which always presupposes that the property remains in the possession of the debtor. And they differ so widely from our mortgage system that, within the Ottoman Empire, all public records of these modes of guaranty are wanting.

239. Indeed, strictly speaking, it may be said that no special mode of solemnisation is needed for the validity of such deeds, as, neither in any part of the *Sharaa*, nor in the Imperial ordinances, is any provision of law to be found which ordains that the contracts be drawn up and made known under any form of public execution, or which prescribes any other solemnity.

Even in a recent Imperial ordinance, of 17 *Muharram*, 1284 (May 21, 1867), it is declared that, as to the modes of securing the payment of debts by means of real property, suitable regulations would be published, which are up till now wanting.*

* *Bollettino de Giurisprudenza*, anno ii. p. 104, ordinance of May 21, 1869 (1867 ?) Art. 3 :—Le régime de Firagh-el-wefa "usité pour con-

240. It is true that the surest way not to encounter difficulties and obstacles is to make use of the intervention of the *Câdi*, who acts as a notary in the Ottoman Empire, and to make and publish the *hodjat*, or contract, at the *Mahkamah*.

But I am of opinion that, even by a simple private deed, and even without any deed, and by the simple presence of witnesses, contracts of this nature could be stipulated, and their full efficacy and validity sustained; for, according to Ottoman Law, proof by witnesses prevails over proof based upon writing, and the latter is never required, under pain of nullity, for the validity of contracts, of whatsoever nature.

241. But in Egypt it appears that the Viceregal Government has wished to prescribe formalities, for the validity of mortgages, by its Circular of April 13, 1864.*

By this Circular, no modification is brought about in what the *Sharaa* prescribes relating to the manner of giving real estate securities. Thus, it is to be held that, when *mortgage* is spoken of therein, it is wished that the first mode we have indicated be understood, to wit, that of the delivery of the possession of the property to the creditor, which comes the nearest to our mortgage. And this all the more so, as no other *règlement* has been published by the Viceroys on this subject; and this Circular does nothing but prescribe formalities for mortgages in general.

242. It begins by indicating which are the authorities entrusted with overseeing the application of the mortgage system, namely, the *Mudiriahs*, for lands, and the *Mahkamahs*, for houses.

It then enumerates the solemnities to be published, which are the following:—

stituer le bien-fond en garantie d'une dette, et les conditions dans lesquelles les biens-fonds non hypothéqués pourront être affectés au paiement des dettes du propriétaire, ainsi que la procédure à suivre à cet effet, soit durant la vie, soit après le décès du propriétaire, seront déterminées par des règlements."

* *Bollettino*, anno ii. p. 63.

1. Verifier les titres des propriétés qui sont offerts en garantie hypothécaire.

2. Constater la validité des Hoggets soit quant au fond, soit quant à la forme.

3. Observer que ces propriétés ne soient point grévées d'obligations antérieures.

4. Consacrer l'hypothèque par l'accomplissement des formalités du système hypothécaire.

243. Nothing, however, is therein said as to the delivery of the possession of the property to the creditor. But, so far as the conclusion is given by the *hodjat* of mortgage, above cited,* this delivery may come to pass either actually or fictitiously, that is to say, through the declaration, contained in the contract, that the delivery is understood to have been made to the creditor, and that this latter becomes the legal possessor, although he is not materially seized of it, but that the enjoyment of the property remains with the debtor in a precarious manner.

244. In other provinces of the Ottoman Empire, also, we see an ordinance published, in relation to the solemnities of mortgages, like the viceregal one. Thus, the Governor of Mount Lebanon, *Franco Pasha*, being in the same doubt as the viceregal authorities as to the nature of mortgage, published the following ordinance:—†

"S. E. Franco Pacha, considérant l'irrégularité des hypothèques dans le Liban, vient d'ordonner:

1. "Que tout acte d'hypothèque, pour une somme quelconque, sera enrégistré au tribunal du pays où se trouvent les biens hypothéqués.

2. "Que tout acte qui n'aura pas été enrégistré, dans les formes ci-dessus, sera considéré comme nul et non avenu.

3. "Que lorsque la somme a été payée, acte en sera enrégistré au même tribunal, pour que l'hypothèque soit lévée, et que la propriété ne reste pas hypothéquée même après le paiement de la dette.

* See *ante*, paragraph 227.

† See the Journal of Syria, April 7, 1869.

4. "Publication sera faite de la présente loi pour que personne n'en ignore."

245. But a real and important innovation upon the *Sharaa* has been introduced by the more recent Imperial ordinances, and also by the *règlements* in Egypt, which is that of the forced sale of the real property of the debtor.

The Imperial ordinance upon the right of property of foreigners speaks, in Article 3, of this forced sale as of a system to be followed throughout the empire.*

And in Egypt the present Viceroy (Ismaïl Pasha) published an apposite *règlement* for the forced sale of real estate for debt, under date of 29 *Dhil-Kiadah*, 1281, corresponding to April 25, 1865 (or, 29 *Dhilhiggah*, 1281, equal 25 May, 1865).

246. In Article 1 of this *règlement* the principle is clearly enunciated that the proper public authority must proceed to the forced sale of the property, both personal and real, of insolvent debtors: "Le débiteur dont la dette est bien établie par Sened, specifiant le paiement par son propre produit, qui ne peut pas satisfaire aux paiements réclamés par le créancier, et celui-ci, ne lui accordant pas de délai, demande l'expropriation de ses biens, l'autorité procédera à la vente des biens en général, immeubles, bestiaux, et autres du débiteur."†

247. But, notwithstanding this *règlement*, inasmuch as the organisation of the tribunals is so bad, and as execution, both upon chattels as well as upon real estate, is entrusted to the administrative (executive) authorities, it is with difficulty that a forced sale of real estate can be obtained; and it often requires the pressure of the Consular authority to induce the Government to observe its own regulations, when a European has an action against a native.

248. From what we have so far set forth, we can conclude that, throughout the Ottoman Empire, a hypothecary system, such as we understand it in

* *Bollettino*, anno ii. p. 112. † *Bollettino*, anno ii. p. 8.

Europe, is absolutely lacking; and that the system in force, to the end that real estate may serve for guaranteeing debts, is so defective that it is useless to look for good results from it. Thus, the need is very urgent for keeping the promise, so often made by the Government of the Porte, to publish laws that shall supply the defects of the existing system.

249. We believe that we have hereby presented to our readers a sufficiently exact notion of the state of Ottoman legislation as to the mode of using real estate as a guaranty for debts.

250. But, before ending, we wish to examine the question of the position, as regards the mortgage system, of foreigners who possess real property in Turkey, and as to how the Consular Tribunals ought to conduct themselves in the case of questions of mortgages coming before them for decision.

251. To this end, we will ask ourselves this question: Whether the provisions of law that we have thus far set forth, relating to the mortgage system in the Ottoman Empire, ought to be applied not only by the Local Tribunals, but also by the Consular Courts? Or, in other terms, whether the jurisdiction which, throughout the Ottoman Empire, belongs to Consulates, authorises them to apply their own laws, when they are called upon to decide questions relating to mortgages, or whether they ought not rather to apply Ottoman law?

252. For the case can very well happen, when a native attacks a European before his Consulate, or when one European brings an action against another European, that it will be called upon to decide whether a mortgage given upon real estate, belonging to a European, is valid, or to decide what are the effects of such mortgage.

253. That, in both cases, the Consular Tribunal is competent to decide the question is undoubted, for these Courts are competent in every kind of controversy, even if it concerns questions of real estate, as we believe we have fully shown in our *Mémoire*, published in vol. i.

of the *Bollettino*, and entitled, "*Dei tribunali consolari in Egitto e della loro giurisdizione specialmente in quistioni di proprietà immobiliare.*"

254. But the fact of being competent to judge these cases does not necessarily imply that in so doing they must apply the laws of their respective countries. For there are cases without end in which a tribunal may be competent to decide a given controversy, and be, at the same time, bound to apply a foreign law. This happens whenever, by the principles of private international law, the subject-matter of the dispute is regulated by this law rather than by national or home law.

255. It is a very grave, and even fatal, error, which one often hears repeated, that the judge must apply no other laws than those of his own country, so as not to be the magistrate of a foreign legislation. Schaeffner says*:—"The judges of a country must, to speak the truth, apply the laws of their country, but only when these can be applied. If, for all this, they apply the law of the foreign country, in many cases in which that law becomes the guide for their right decision, it can in no way be upheld that they thereby become organs and ministers of a foreign legislator. On the contrary, they do no more than observe the rational will of their own lawgiver, as it cannot, with reason, be admitted that the latter had entertained the absurd proposition that all cases come into actual being within the domain of his laws."

And Rocco observes, with reason†:—"No sooner does a given case have to be settled by the law of a foreign country, than the supremacy of that law becomes legitimate under the hands of the magistrate, and, as it were, becomes nationalised, and the *rectitude* of judging according to it in the country becomes indispensable, as does also the supremacy of the law itself."

256. But it may be, perhaps, feared that the judge be ignorant of the foreign law; or, he may himself

* Schaeffner, *Esplicazione del diritto Internazionale privato*, cap. i. *principii generali*, § 27.

† Rocco, *Trattato di Diritto Civile Internazionale*, lib. i. cap. 26.

object that he is not obliged to know all laws. To such an objection Esperon answers:—

"There is no doubt that a judge may be unacquainted with foreign legislations; but this is as much as to say that it is incumbent upon the parties to produce in Court the foreign law, the application of which they invoke. The foreign law may be considered as a fact as regards the magistrate, whose duty it is to apply it; hence, it is for the litigant by whom it is invoked to justify its existence."*

257. The truth is that, by the plainest principles of private international law, which are now to be found written in the various modern codes, and especially in the Italian Code,† the judge can and must apply the foreign law whenever the subject-matter of the controversy relates to objects that are placed under that, and not under the home, law. Because, as Schaeffner says: "Every juridical relationship must be judged according to the laws of the place where it originated."

And Savigny observes, that the law to be applied, in all cases of conflict, is that of the place in which originated the basis for the legal claim of the parties against one another, and to which law the parties had voluntarily submitted themselves.‡

258. Hence, in order to determine whether the Consular Tribunals of the Levant ought to apply their own law, or whether they ought to apply Ottoman law, whenever a question of mortgage is submitted to them, it is necessary to determine whether matters of mortgages are, by private international law, placed under the one or under the other law.

259. And we think that we can with certainty assert that Ottoman law is the one which should be applied in questions of mortgages; for all authors on

* Esperon, *Il principio di Nazionalità*, cap. 3, § 11.

† The Italian Civil Code was the first which raised all the principles, that the science of International Right had established, to the rank of legislative provisions. (See in this respect the provisions *upon the publication, interpretation, and application of the Laws in general*, which precede such Code.)

‡ Schaeffner, *op. cit.* § 32. Savigny, *Traité de Droit Romain*, tom. viii. § 345 and 360.

international right are agreed in holding that mortgages stand under the "Status Realis," and thereforé under the law of the land wherein the mortgaged property is situated.

Foelix, *Droit International privé*, livre i. titre 2, § 60.—"La loi de la situation de l'immeuble décide si un objet corporel, ou un droit incorporel attaché à un immeuble est lui-même meuble ou immeuble . . . ."

"Cette loi régit également, abstraction faite de la capacité général de l'individu, tout ce qui concerne . . . . les droits de privilège ou d'hypothèque légale, conventionelle, ou judiciaire sur les immeubles, les formes prescrites pour l'acquisition et la conservation des mêmes droits, et pour l'expropriation forcée, et l'ordre des créanciers."

Schaeffner, *Diritto Internazionale Privato*, § 64.—"The *lex rei sitæ* must alone define whether there be chattels real and rights attaching to real estate that can be mortgaged, and what they are; and hence what formalities are absolutely necessary to constitute a mortgage by agreement . . . . likewise the *lex rei* declares to what extent a mortgage-lien can be acquired on real property; and according to this *lex* also must be judged and decided the reciprocal juridical relations between the creditor and the debtor, in so far as they refer to an already constituted mortgage; and, observing this *lex*, it is further necessary that, account be taken of the priority of liens among the mortgage creditors, and of the distribution of the proceeds in the order of such priority.*

260. So that in all questions having for their subject-matter mortgages and the modes in general use relative to real estate securities, the Consular Tribunals, which are undoubtedly competent to decide therein, ought to apply, not their home law, but the national, that is to say, the Ottoman law. The parties, too, ought to prove to these Tribunals the existence of the provisions that they mean to invoke in support of their rights.

* With these authorities Rocco agrees,—*Diritto Internazionale*, § 293;—and Matthaeus, *De auctorit.* lib. c. 21 m. 35;—and *Voet ad Pandectas*, lib. xx. tit. 4, m. 35.

Perhaps it may be thought that such a thing is too difficult. Difficult it is, but assuredly not impossible; for many works on Moslem law, and all the imperial ordinances and regulations, have been translated into European tongues, accessible to all. And in every case they should consult Moslem jurists in order to obtain from them the necessary advice.

261. This demonstrates how erroneous is the system, upheld by some Consular Tribunals, of applying, to questions of mortgage, their own national laws, which can exercise no influence over real estate situated in foreign countries; and to what great confusion and uncertainty such a system leads, since it is not possible to follow, in Turkey, the forms that are required for mortgage in Europe.

This error comes from forgetting the principles of international law indicated by us, and from confounding jurisdiction with legislation. Because it is believed by many that, from the power of Consulates to exercise jurisdiction in the Levant, it follows, necessarily that they ought always to apply their own legislation. Whereas this is not true, and is contradicted by all that we have hitherto set forth.

262. From this principle, that the mortgage, if given by a foreigner, depends upon the local law, another conclusion must be drawn, namely, that, as to the forms and solemnities to be observed, it is the Ottoman law that should be followed, and not in the least those forms and solemnities that are observed in Europe.

263. Thus, if a foreigner possesses real estate in Turkey and wishes to mortgage it, he must do it in one of the four modes we have pointed out, and follow the forms prescribed by the local law.

264. And if the local law prescribes no modes for the giving of such securities, then the parties are free to avail themselves of those modes that suit them best, so long as these do not clash with Ottoman law.

265. We mention this so as to open the way for determining whether the contract, by which real estate is mortgaged to secure the payment of a debt, ought neces-

sarily to be executed before the *Mahkamah*, or whether it may also be executed before the Consular Chancery. For both these authorities have the same material powers and functions, and either can authenticate public instruments.

266. Now, nowhere in Ottoman laws (if one excepts the Egyptian Circular which contemplates nothing else than the *pledging or pawning* of real estate) do we find it written, that the contract, whereby real estate is given in guaranty, whether in the form of a pledge or in that of a mortgage (*hypothecary mandate*), with power to sell, or in that of a simulated sale, or of *antichresis*, must, or ought to be, public, and much less that it ought, under pain of nullity, to be executed before the *Mahkamah*.

267. Indeed, this solemn form for such contracts can be said to be absolutely excluded, seeing that, according to the letter and spirit of Moslem law there is no agreement or convention that has need of the notarial form. On the contrary, any and every agreement may be proved by means of witnesses. This proof, as I have before noticed, is the best and the most solemn, according to that law. And in this it differs very widely from European legislation, which looks with an unfavourable eye upon proof by witnesses, holding it to be most dangerous, in view of the immorality of mankind, and of the fact that the sanctity of an oath is often outweighed by considerations of interest.

268. From what precedes I draw the following conclusions:—That the so-called *hodjats*, to wit, authentic title-deeds, can be executed before the *Mahkamah*, and also before the Consulates, whatsoever be the agreement that they have for their subject-matter, provided that one of the contracting parties is under the jurisdiction of the Consulate before which it is executed.

269. In fact, the word *hodjat* means no more than an authentic title, to wit, an instrument or deed attested by an authority having the *fides publica*, or, in other terms, a public act or notarial act, as we call it.

The *hodjats* in Turkey, moreover, may have for their subject-matter any and every act or deed, whether

between living parties or last wills, and, therefore, testaments, conveyances, purchases and sales, gifts, mortgages, &c., and are not limited, as is erroneously believed, to the purchase and sale of real property.

270. Now, the *fides publica* and the notarial powers and functions are possessed both by the Consulates and by the *Mahkamah;* and deeds authenticated by either of them are equally public and may be said to be worthy of faith and credit. Hence, like as a deed (*hodjat*) which is made before the *Mahkamah* has the force of proof and full authenticity, so must the same be said of an instrument authenticated before a Consulate. And like as a last will, authenticated by the latter, is fully respected by all authorities, whether consular or local, so must the same be said of the contracts of purchase, conveyance and sale, donations, &c., that are executed in a Consular Chancery; and the same must therefore be said also of those contracts which have for their end and aim the pledging of real estate in guaranty, whatever be the form that is adopted, provided that it comes under one of the four forms allowed by Ottoman law.

271. And if, on the contrary, in the contract executed before the Consulate, a form had been adopted different from those that are allowed by Ottoman law, and the form of European law had been followed,—as for example, if a lien had been given in such a manner as is the practice in Europe,—then, in such a case, the contract would have no force at all, and the guaranty given by the lien upon the real estate would be wholly worthless.

272. This tends to condemn the system that has for a long time been followed, and is still sometimes followed, of agreeing to a lien upon real estate by simply delivering to the creditor the *hodjat* or original contract of purchase of the property. This form, which is not met with in Ottoman law, cannot be deemed as one giving to the creditor a real right or lien upon the property outweighing the rights of other creditors.

273. But the following would be fully valid forms:—If, by a contract drawn up before the Consulate, a *mandat hypothécaire* were conferred by a European debtor, or if a sale were made with the agreement of repurchase or redemption (*à réméré*), or if lands were given in *antichresis* for guaranteeing a debt.

274. And similar contracts should be deemed valid to such an extent as that the local authorities also ought to recognise them. Therefore, if the creditor, who, for example, had become a proprietor by virtue of the sale by agreement of redemption or repurchase, should afterwards wish to resell the property to a native, and should for that purpose present himself before the *mahkamah* to execute the new contract of sale, the *makhamah* ought to recognise him as the lawful proprietor. It would, in truth, be strange if, whilst the local authority gives faith and credit to two witnesses that bear testimony to the sale, it should not afterwards give the same to a title or deed issued by an authority having the *fides publica* in the highest degree, namely the consular authority; and that, whilst this authority gives faith and credit to the *hodjats* issued by the *mahkamah*, the latter would not give the same to notarial acts authenticated by the former.

275. And yet this is what does happen continually, and obliges Europeans to put up with the most humiliating treatment and to finally resort to tergiversations, and also to fictions, so as to obtain the *hodjats* from the *mahkamahs*, and this to the belittling of the consular authority.

The true *indoles* of the *hodjats* having become known, and it having been found that they are never required by Ottoman law for the validity of deeds, whether between living parties or for last wills and testaments,—this, I say, being so, it is time that the consular authority, upholding its own dignity, should oblige the retrograde and intolerant *mahkamah* to respect the authentic deeds that are issued by the Consular Chanceries.*

* The same must be said as to forced sales or foreclosures of real property that are ordered by the Consular Courts against European

§ VIII.—*Of Wakf, Wakouf, or Aukâf.*

276. The matter of *wakf* is one of the most important in Ottoman legislation, whether because the principles of law and right thereto relating are highly interesting, or because *wakf* properties constitute a very great portion of the lands and buildings of the Ottoman Empire.*

277. The word *wakf*, according to the *Hidâyah*,† in its primitive sense means detention, and in the legal sense it means the setting apart of a given thing in such a way that the rights of the one who acquires the right of property thereto continue over it, whereas the use and advantage are to be turned to some charitable object.

And hence it adds :—"According to the followers of the *Hanafi*, *wakf* signifies‡ the setting apart of a given thing in such wise as to put it under the rules of divine ownership, by virtue whereof the right of the proprietor becomes extinct, and it becomes a thing owned of God, with this peculiarity, however, that the good to be got from it goes in behalf of His creatures."

debtors. The *mahkamah* does not even admit their validity, and hence refuses to recognise the buyer at a consular auction-sale as the lawful acquirer of the real estate ; and does not permit him to resell it to a native by means of *hodjat*. This is so exorbitant that we cannot understand how the Consulates tolerate it, and do not force the local government to cause such foreclosures to be respected by the mahkamah. Either the Consulates should cease to execute them, and this they cannot do, because they would renounce one of the most important prerogatives of their jurisdiction, or they should claim respect therefor at the hands of the Ottoman authorities.

* Heuschling, *L'Empire de Turquie*, p. 105, holds that three-fourths of the real property in Turkey is *wakf*, to the great loss of the treasury, of the collateral heirs, and of the creditors of the holder.

† Hidâyah, book 15, *Of Wakf* or *Appropriation*, tom. ii. p. 335.

‡ *Wakf* means, in its ordinary acceptation, a stopping, a standing still, or a setting upright and fast; — the word *immobilisation* comes as near to it as any word in the languages of Europe.— *Translator's Note.*

278. *El Multaqua*, cited by Bélin* defines *wakf* to be a provision, or disposal in virtue of which the ownership of a thing, as to its nature, remains in the hands of the disposer, but the increase of which (*manfa'ah*, منفعة) is given in alms, like the *a'ariah*; to wit, like a gift, or donation, made of the full ownership, and without monetary compensation for any rent or increase whatsoever.

279. And D'Ohsson† says of *wakf*:—"Ce mot, qui répond à ceux de cession, consignation, abandon, dépôt, emporte cependant dans son acception ordinaire l'idée d'une chose sacrée, d'un objet voué aux besoins de l'humanité, et du culte public, par un sentiment de piété et d'amour envers Dieu."

280. Finally, Khalîl Ibn Ishâk, translated by Perron‡ defines *wakf* thus:—"L'immobilisation consiste à donner l'usufruit ou l'usage d'une chose pour la durée du temps qu'elle peut exister, laquelle chose doit être la propriété privative entière de l'immobilisant . . . .

"Les Musulmans l'ont designée par le mot *ouakf*, ou *h'obous*, ou *h'abés*, tous sinonimes dont la racine verbale signifie arrêter, mettre en arrêt, mettre en dehors et garantir de tout acte discrétionnaire, enfin immobiliser."

281. From the totality of these definitions given by Moslem jurists, the nature of *wakf* may be deduced; and it may be held that *wakf* is an act by virtue of which the right of property, whether of a chattel or of real estate, is made over to a religious or pious institution, appropriating the enjoyment and the increase to an equally religious or benevolent purpose. So that the effect is such that the thing thus *immobilised* is not susceptible of sale, nor of gift or donation, and not even of mortgage, nor of any modes whatever of conveyance of the right of property, which right

* Bélin, *op. cit.* note 174.

† D'Ohsson, *op. cit.* livre iii. chap. v. § 3, tom. ii. p. 523, where he treats fully of this argument, and to whom I have had recourse chiefly in the present work.

‡ Perron, vol. v. chap. 355, § 1, p. 24.

remains always with the institution to which it has been donated.*

282. From this definition it clearly appears how much *wakf* corresponds to the property of *mortmain* with us; for it has, as its special characteristic, that it cannot change owners. Moreover, it at times also resembles the *Emphyteusis*, as will be shown when we come to speak of the divers kinds of *wakf*.

283. As to the origin of this institution, the jurists claim that it is purely Moslem. Thus Khalîl Ibn Ishak, translated by Perron (*loc. cit.*), says:—"L'immobilisation est d'institution musulmane. Dans le Paganisme arabe l'immobilisation était inconnue."

284. I, however, believe that this institution, like so many others of Moslem law and right, was taken from the nations already subject to the Romans, who knew the system of property of mortmain and *Emphyteusis*.†

285. Still, the Moslem jurists cite a saying of the Prophet to Omar, couched in the following words:—

"Dispose of this land in such wise that it may not be sold, or donated, or transmitted by heirship."‡

And upon this saying they claim that the institution of *wakfs* is founded, and thus explain its origin.

286. The juridical idea of *wakfs* having been thus given, it is necessary, before examining its requirements

* Worms, *De la Constitution territoriale dans les Pays Musulmans*, p. 19, expresses himself thus:—"Le mot *Wakf* et celui de *habes* ont le même sens . . . . faire une chose *Wakf* c'est disposer de cette chose de telle sorte, que la propriété en retourne à Dieu, de qui elle vient, et que la jouissance et l'usufruit seul en puissent rester aux hommes; l'objet ainsi fait *Wakf* ne peut plus être vendu, ni donné, ni transmis comme héritage."

† This institution is just like the holy property (*res sacræ*) of Roman Law, which could not be disposed of, and which hence was said to belong to no one:—"*Nullius autem sunt res sacræ et religiosæ et sanctæ; quod enim divini juris est, id nullus in bonis est. Res sacræ sunt, quæ rite per Pontifices Deo consecratæ sunt, veluti ædes sacræ.*" "Instit. De Rer. Div." § 7 et 8. The *ædes sacræ* of the Romans answer precisely to the mosques of the Moslems, which are the most legal of *wakfs*.

‡ Bélin, *op. cit.* p. 80.

and consequences, to note that they are distinguished into three species, to wit :—

1. *Wakfs* appropriated directly for the promotion of religion, that is to say the Church property.

2. Public *wakfs*, such as are appropriated to the help of the poor and for the welfare of mankind.

3. Consuetudinary *wakfs*, or *wakfs* by usage, which, as to the right of property, belong to the mosques, but the rents and increase of which go to private individuals.*

287. Every kind of property, both personal as well as real, can be made *wakf*, that is to say rendered inalienable, in such wise as that it cannot be alienated nor turned away from the religious purpose to which it is appropriated. Thus, sacred books and other objects for religious service and worship, or for teaching, may acquire the nature of *wakf*.†

288. The *wakfs* of the first category comprise all the patrimony of the mosques, and in it the mosques have full and absolute right both of property and usufruct. These *wakfs* correspond, therefore, to that which constitutes the true and proper property of mortmain, and which is possessed and enjoyed by this *dead hand*.

Thus these *wakfs* comprise, besides all the buildings set apart for worship (to wit the mosques) also the lands and edifices whose rents and *increase* are appropriated to the maintenance of the sacred buildings and of the ministers of the religious *cultus*.

289. The second category of *wakfs*, called public *wakf*, comprises the property appropriated for the poor and for benevolence in general, namely, the public fountains (sabîl, سبيل), the wells, cemeteries, hospitals, schools, colleges, libraries, bridges, oratories, raised on the main streets, and the rents or increase appropriated for the

* D'Ohsson, *loc. cit.* p. 544.—Worms, in *loc. cit.*, finds fault with this nomenclature, maintaining that there exist no consuetudinary *wakfs*. But the authority of D'Ohsson and of Bélin seems to me such as to leave no doubt as to this third category.

† Bélin, *op. cit.* p. 83, where he cites various examples of such kinds of *wakfs*.

Darwishes, the pensions given to the servants of the mosques, and also to the friends and relatives of the founder; and, lastly, the property appropriated to the maintenance of the castles, fortresses, frontier outposts, and the like.

290. The third category is that of the consuetudinary or civil *wakfs*. They differ from the others in this, that they are founded upon Imperial ordinances, and upon the authority of the modern Ulema, whilst the former are expressly authorised by the *Sharaa* and by the old jurisprudence.

They consist in the cession or sale that the owner of real property makes to a mosque by way of *wakf* for a low price, with the agreement that the mosque shall leave the enjoyment and usufruct to the seller and to his heirs for ever, on the payment of an annual charge, which corresponds to the interest on the price paid, and with the obligation of maintaining the property in good condition. Upon the extinction, moreover, of the line in which the enjoyment of the *immobilised* estate is vested, this latter passes over to the mosque, which then unites in itself both the enjoyment and the right of property, and thus becomes the free and absolute owner, as in the *wakf* of the other categories.

This category of *wakfs* is the one which approaches the nearest to our *Emphyteusis*, as the holder has in reality only the *dominium utile* of the property, while the direct *dominium* belongs to the mosque, to which, by way of recognition of its right in *dominium*, the yearly charge is paid. Later on it will be seen that there are other points of resemblance with our ecclesiastical *libellæ* or of mortmain.

291. Further, throughout the Ottoman Empire, not only the Moslems, but the Christians [and other dissenting sects] can make use of the form of *wakf* to "immobilise" (render inalienable) in favour of their churches and in favour of their poor, both movable and real property. And this *immobilisation* is recognised and respected by the Ottoman authorities.*

* Examples of books, made *wakf* by Christians are cited by Bélin,

292. Although the categories of *wakf* are three, still we may distinguish them juridically into two species :—

1. In the first are those whereof both the right of property as well as the enjoyment and usufruct remain with the mosque or pious institution in favour of which the *wakf* was created. These *wakfs* embrace the first and second category, and are called *Wakf Shari'y*, or legal *wakf*, because they conform to the religious law.

2. In the second species are those of the third category, in which the possession and the occupancy is separated from the right of property, and in which the direct *dominium*, which is with the mosque, can be distinguished from the *dominium utile*, which is with the holder of the *wakf*. And these are called *Wakf A'adi*, that is, consuetudinary or civil *wakf*.*

First Species.—Wakf Shari'y.

293. The first species of *wakf* may consist of real property as well as personal, of whatever nature, provided only that at the time of founding the *wakf* it be within the full and absolute right of disposal of the founder; in other words, provided that the property belong to him as *mulk*.

294. Further, there is needed for its constitution a judiciary deed or instrument executed before the Câdi, who performs the office of notary, and who must register it in the Tribunal of the *Mahkamah*. If the constitution should have been made verbally, it would not be valid, except in so far as the founder himself should respect and fulfil it.

p. 84. And, as to real property, I can refer to a *wakf*, here in Alexandria, made in favour of the Greek Catholic Church by a certain Tawîl, who, besides the church building, immobilised various large buildings for the good of the poor of his sect, and the deed of *wakf*, of which I have the translation, was drawn up by the *mahkamah* of this city (Alexandria).

* From the description that Pharaon gives in his work *Le Droit Civil Musulman*, livre iii. tit. 4. § 1, p. 280, it seems that the *Hobuss* or *wakf* of Algiers corresponds to those of this third category.

295. The founder of the *wakf* has full freedom of choice to put into the deed of constitution all conditions he chooses, and these must be scrupulously respected, whether as to what appertains to the employment of the rents and increase, or as to what belongs to the administration of the *wakf*. It is necessary, however, that the setting apart or appropriation of the *wakf* be *for ever*, and that this be set forth in the deed of foundation.

296. Moreover, the appointment of an administrator is an essential condition, and must be provided for in the deed of foundation.

According to the *Sharaa*, the administration of this *wakf* must be regulated as follows:—There must be a director or administrator, denominated the *Mutawally*, or Waly-il-*wakf*, and there must also be an inspector, to whom the director is bound to render an account every six months or every year. This inspector is called the *Nâzir*. But, if no inspector be appointed, the *mutawally* or administrator must render account of his administration to the judge of the place.

297. The directors, *mutawallys*, of the *wakfs* of mosques have the name of *Mutawally-l-djâmi*, and those of all the other public *wakfs* the generic name of *Mutawally-l-wakf*.

298. The director of the *wakf* is bound to bestow the greatest attention in the administration of the property, and to hold himself strictly to the will of the founders in the erogation or disbursement of the income. He cannot, therefore, intervert the use of such rents or *increase*, nor appropriate them to himself, under any pretext whatsoever; nor even dwell himself in a building comprised in the *wakf*, without paying the rent. And if the directors (administrators) neglect their duties, they must be discharged by the magistrate, who has power to appoint new ones to take their place, as well as to fill vacancies arising from any other cause.

299. The founder of a *wakf* may appoint, as director or administrator of the *immobilised* property, any one he pleases. He can also constitute, as *mutawally* (administrator), himself, his own wife, his own children

and near relatives without end, establishing the order of succession in which the administratorship is to devolve upon them. And he can, moreover, appropriate the income from the *wakf* to himself, to the mothers of his own children, and to other relatives during their natural lifetime, only that after their death the rents and increase shall be appropriated for the poor.*

300. The office of *Mutawally* and that of *Nâzir* is deemed to be in itself a gratuitous one, for it is considered to be exercised for the love of God and of one's neighbour; and it brings with it only a small emolument, which is in each case fixed by the founder in the deed of foundation, and is called *djïzmah bahha* (allowable or lawful fee). In reality, however, the directors of *wakfs* take a good portion of the income therefrom; that is to say, all that is over and above what is needed to fulfil the directions of the founder. This surplus ought to enter into the private cash-box of the *wakf* and serve as a fund for extraordinary occurrences. But the directors, not over-scrupulous, appropriate it to themselves, and there is no one to call them to account, it being easy for them to avoid the control of the authorities.†

301. And it is for this reason that, in order to favour their own children and relatives, the founders of *wakf* are wont to appoint them to the directorship over the property, so that they may enjoy its income. In this way, the founder attains his intent of assuring some property for ever in his family, thus withdrawing it from dissipation by his heirs, as well as from the possibility of confiscation by the sovereign or ruler, who cannot touch nor confiscate *wakf* property, as it is a sacred thing. But, for all this, when the sovereign learns that the income from *wakf* property enjoyed by a family is important, he does not scruple to appropriate it to himself, reserving to the mosque, or other pious work for which it had been appropriated by the founder, so much of the income as is really needed, and taking the remainder himself.

* Bélin, *op. cit.* note 186, *et seqq.* † D'Ohsson, *loc. cit.*

302. When once real estate has been declared *wakf*, the *mulk* right of property of the giver ceases, and it becomes utterly inalienable. Hence, as we have already observed, it can neither be sold, nor donated, nor even mortgaged. Only in case of need can the administrator (the *mutawally*) exchange it for other real property in more advantageous conditions, or at least in conditions in every way equally advantageous.*

303. On the other hand, the property belonging to a *wakf* may be leased, provided the conditions expressly laid down by the founder in the deed constituting the *wakf* are observed.

And if no conditions be fixed in the deed, the lease must be made for a limited time, but with the condition that the rate of the rent shall never vary, not even when a greater rent might be obtained by competition.† For this principle, which at first sight appears so contrary to our ideas as to the rights of the proprietor, a reason may be found in the nature and purpose of *wakf*, which, being set apart for a benevolent end, once that this has been reached, every augmentation of the rents becomes useless, and reduces itself to a speculation, which is not consistent with the inward characteristic of this institution.

304. The leasing of *wakf* properties can be done in two ways: either by the simple form of *idjârah*, fixing a rent-charge to be paid at the end of every year, or else under the form of *idjâratain*, *i.e.*, a double rent, which consists in paying in advance a sum by way of entrance into possession and enjoyment of the property; and, further, in fixing a yearly sum, to be paid at the end of every year, as the lease-rent.

This second way of leasing is used to reduce *wakf*

* D'Ohsson, *loc. cit.* p. 549.—Bélin, *op. cit.* note 209.

† Bélin, *op. cit.* § 204. It is from this principle, relating only to *wakf* properties that can be leased, that the belief has perhaps arisen that in every sort of lease the yearly rent can never be varied. This belief is an erroneous one; for, as regards free property, the owner can, at his pleasure, increase the yearly rent, the same as in Europe, and no restriction of this right is to be found in Ottoman legislation.

properties to what is called *mukata'a*, that is to say, a lease without end, which is almost as much as acquiring the full right of property.*

305. Thus, the lessee pays a sum to the director of the *wakf*, and binds himself, furthermore, to a yearly rent for ever. In this way he frees himself from all ingerence, on the part of the *wakf*-administrator, over the property in question, with which he can do as he likes, provided the yearly rent-charge is paid. He can also grant, or he may transmit, to his own male children, the *wakf* thus possessed by him, there being therein no other obligation than that of paying to the mosque a fee, or tax of transmission.

306. And, by the recent Imperial ordinance of 7 Saffar, 1284 (10 June, 1867), it has been prescribed, as to the transmission by succession of these *wakfs*, obtained in perpetual lease by the form of *idjâratain*, that they are transmissible, not only to own sons, but also to the lawful heirs, until the seventh degree, including the surviving consort. In this way the transmissibility, by inheritance, of this kind of property, has been extended; and, the extinction of the lines admitted to the right of heirship being rendered more difficult, it may be said that this kind is almost within the right of property of the holder. It is, nevertheless, true that this extension has been made only for *wakfs* founded by the Sultans, and by members of the Imperial family, and for those coming under the Administration of *wakfs*. For those, however, that are administered by private individuals, the ancient rules continue to hold good.†

307. As to the administration of these *wakfs*, as we have already noticed, it is entrusted to him who has been appointed by the founder, and also to whole families. But upon the extinction of those entitled to it, the administratorship passes over to those public officials who constitute the suitable *dicasterion*, namely, that of the

* Bélin, *op. cit.* pp. 96–204, *in notis.* The Imperial ordinance of June 10, 1867, reproduced in the *Bollettino*, year ii. p. 110, note 1, speaks of this perpetual lease of *mukata'a*.

† *Bollettino*, year ii. p. 110, said ordinance, art. 7.

Aukâf.* Thus, then, as to the administration of *wakf*-property, it belongs either to public officials (and hence, to the State), or else to simple private persons. In the first case, the rents which remain over, after the obligations prescribed by the founders have been fulfilled, enter into the treasury of the administration of *Aukâf*, that is to say, of the State, because this administration belongs to the State. In the second case, although illegitimately, the rents of the *wakf*-property go to the profit of the administrators indicated by the founder.

308. Lastly, we will observe that, in all Moslem countries, there are many *wakfs* in favour of the holy cities, to wit, Mecca and Medina, that have a special administration, and of which the rents are set apart for succouring the Moslem poor who undertake the pilgrimage to those places. The property "immobilised" for this pious and religious aim is quite extensive, but its yield serves, ordinarily, only to enrich the directors entrusted with its administration.†

309. It was necessary to note these different administrations of *wakfs* in the Ottoman Empire, because a recognition of them serves to point out to whom one has to apply when having to do with this species of property, and who is the lawful representative, not only in ordinary transactions, but also in litigations. Indeed, if the matter is one concerning *wakfs* subjected to private administrators, which in this respect might be called private *wakfs*, it becomes necessary to ascertain who these administrators are, according to the deed of foundation, and what are their rights, duties, and powers. And, if it concerns *wakf* subject to the public administration, whether originally so, or become so by the extinction of the directors appointed by the founder, it is always necessary to have recourse to the *Dicasterion of Aukâf*, which is the lawful representative.

* In D'Ohsson will be found the details as to this public administration of the *wakfs* of the species we here speak of.

† Pharaon, *Droit Musulman*, sect. v. p. 157.—D'Ohsson, *loc. cit.*

*Second Species.—Wakf-A'adi, or Consuetudinary.**

310. Consuetudinary *wakf*, as has been already said, consists in this, that the owner of real property makes the sale thereof, under the title of *wakf*, to a mosque, which pays the price of the same to the seller, but leaves the real property in his hands, in order that he may enjoy the usufruct, for a yearly rent-charge. The holder and usufructuary takes the name of *Mutassarrif*, and enjoys the real property for the time determined in the contract of sale, after which it reverts to the mosque, which thus unites the possession and the enjoyment to the right of property.

311. The price for which the mosque acquires, under this title, the real property, is most moderate, and represents not more than 10, 12, or 15 per centum of the real value. And in return for the leaving, the yearly rent-charge to be paid to the mosque corresponds to the interest of the money actually paid over by it to the seller.

The contracting parties, moreover, are free to put into the contract of foundation all the agreements and conditions that seem to them opportune and suitable to their respective interests.

312. The juridical consequences of this mode of constituting a *wakf* are the following:—

1. The founder or holder remains in the fullest enjoyment of the property for ever, and can dispose of it at his pleasure, whether by leasing or selling, or even by mortgaging.†

2. The selling and mortgaging of the property, however, cannot be effected without the express authorisation of the director (*mutawalli*) of the *wakf*. And in such cases there must be paid, for the consent

* D'Ohsson, *op. cit.* p. 552, is the author who speaks fully of these *wakfs*, and from whom we have taken the greater part of what we say about them.

† Mortgage, the same as sale, is absolutely forbidden for *wakf* property of the first species.

given by the *mutawalli*, a sum which is called *Rasm-firaghah*.

3. The real property thus "immobilised" cannot be expropriated by the creditors of the holder nor by any one else, and is considered as sacred and not to be touched. Hence it is not subject to confiscation, nor to the right of pre-emption for reason of contiguity (*shifa'ah*) which is exercised over the free real property of the neighbour by the person owning the adjoining property, who, in the case of sale, has the right of preference over every other purchaser upon equality of terms and conditions.

4. This real property passes to the children and descendants of either sex for ever, who divide it among themselves by perfectly equal shares, whereas, when dealing with real property *mulk*, the law of inheritance gives one part to the females and two parts to the males. If, however, the holder leaves no children in the first degree, the real property cannot pass to his nephews, and the line of those admitted to heirship is held to be extinct.*

5. All the expenses of repairs are to be defrayed by the holder, and all the additions and improvements remain for the good and augmentation of the property, and therefore for the benefit of the mosque.

6. On the extinction of the line having the right to inherit,—that is to say, when the last of the line having this right dies without direct heirs,—the property is considered as vacant (*mahlûl*), and passes for this reason to the mosque to the exclusion of all the collateral relatives of the deceased.†

* By the recent ordinance, concerning inheritance of *wakfs*, of the 10th of June, 1867, the right of succession to this kind of property has been modified in the manner previously indicated by us; so that they pass to the lawful heirs to the seventh degree, including the surviving consort.—*Bollettino*, year ii. p. 108, *et seqq.*

† By the ordinance cited above, and by the preceding ordinance of May 21, 1867, concerning the right of inheritance of *wakf* property; the *jus of representation* has been introduced in favour of children dying first, which was forbidden by the *Sharaa* and by the preceding ordinances.—*Bollettino*, year ii. pp. 101 and 209.

7. In case of the burning of the buildings on real estate that have been made *wakf* in this manner, the annual rent-charge becomes reduced and proportioned to the parcel of land upon which the building was constructed, and which always remains *wakf*.

8. Upon a *wakf* parcel of land it is not lawful for the holder to build without the permission of the mosque; and, if he does build, the mosque has the right to cause the construction to be torn down or appropriate it to itself immediately.

If, however, he has obtained the permission to build thereon, the holder is free to make the building *wakf*, or to build it as free *mulk* property.

In this case there are two proprietors; to wit, the mosque as of the land, and the holder as of the building, of which he can dispose at pleasure without the consent of the mosque, not being bound towards it except for the payment of the annual rent-charge fixed upon the land.

9. In case that, for three consecutive years, the holder fails to pay the annual charge, the mosque has the full right to appropriate the property to itself and dispose thereof at its pleasure.

313. This species of *wakf* is the one that most resembles the *Emphyteusis* of European legislations. Indeed, we find in it the direct *dominium* separated from the *dominium utile;* the duration fixed according to the line having the right of inheritance; the reversion to the mosque in the case of the extinction of such line; the yearly rent-charge; and lastly, the so-called *laudemi* of conveyance in case of sale or grant.

314. The number of such consuetudinary *wakfs* is very great in the Ottoman Empire, and it may be said that the greater part of the real property is *immobilised* in this way. For it is permitted to Christian Ottoman subjects also to constitute *wakf* of this species in favour of the mosques.

315. In Egypt, moreover, this system is practised on a vast scale. The annual rent-charge that is paid by the holder to the mosque is called, in the common language of the people, *Hikr*, which signifies rent paid

to the proprietor of the real property. And very often this charge is spoken of in transactions having lands or houses for their subject-matter. And in such a case it must be held that these lands or houses belong to the category of consuetudinary *wakf*, of which we have above indicated the characteristics and juridical nature.

316. The severing of real estate in the Ottoman Empire from the bonds of *wakf*, that render it for the most part inalienable, would be of *immense advantage* for agriculture and for credit. In recent times many essays and projects have been made in this direction; but they reduce themselves to the Imperial ordinances of 1867, which have extended the possibility of inheritance in *wakf* property to the families of the actual holders. But what is needed is a more radical remedy, and one that will answer to the complete distribution of the real property of mortmain, as it has been effected by almost all the nations of Europe. In this part of Ottoman legislation also the urgency for reforms is great, as also in the mortgage system. The results that would follow therefrom would be immense and immediate; the more so if it would be, seriously and not simply by ordinances that are not put into application, permitted to foreigners to possess real estate in Turkey, and if they were to be accorded such guarantees by a good legislation and by a good judiciary organisation, as to encourage them to bring their capital into the country. We do not believe the day to be very near when this wish can be realised. But we do say that the force of expansion of European civilisation is so great that every obstacle interposed by Oriental inertia will have to yield at last, and, one day or another, allow the better parts of our legislations to take root in Turkey. It is upon this condition that Turkey was admitted into the political concert of Europe; and upon the way in which it shall be fulfilled will depend the existence or non-existence of the Ottoman Empire.

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